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CONVEYANCING

ACCORDING TO THE LAW OF SCOTLAND

BEING

THE LECTURES

OF THE LATE

ALLAN MENZIES, A.M.



WRITER TO THE SIGNET

PROFESSOR OF CONVEYANCING IN THE UNIVERSITY OF EDINBURGH.



EDINBURGH: THOMAS CONSTABLE AND CO.
HAMILTON, ADAMS, AND CO., LONDON.

MDCCCLVI.



EDINBURGH: T. CONSTABLE, PRINTER TO HER MAJESTY

P R E F A C E.

THE Trustees of the late Professor MENZIES, in presenting this Volume to the Public, have been chiefly influenced by the conviction, that it will be found in a great measure to supply a desideratum that has for many years past been felt, not less by the members of the Legal Profession at large, than by the successive classes of Students, for whose benefit the Lectures were originally designed.

The Lectures are accompanied by references, in the form of footnotes and an Appendix, to the recent important decisions of the Court of Session and of the House of Lords. Since Professor MENZIES ceased to occupy the Chair of Conveyancing, several extensive modifications of the Law have been introduced by the Legislature, and especially in the matter of Bankruptcy. In the notes the attention of the Student has been called to these Statutes, and he is requested to read the text with reference to their provisions.

The Trustees take this opportunity of acknowledging their deep obligations to Professors SWINTON and MORE for their kindness in undertaking the active duties of the Chair of the late Professor MENZIES during last Session, and to JAMES MITFORD MORISON, Esq., Advocate, for the great labour which he bestowed upon the Examinations.

Their sincere thanks are also due to the last-named gentleman, and to JOHN HUNTER, Esq., Auditor of the Court of Session, for superintending the present publication.



LECTURES ON CONVEYANCING.

INTRODUCTION.

CHAPTER I.

EDUCATION OF THE CONVEYANCER, GENERAL AND PROFESSIONAL.

THE business of the Chair of Conveyancing is to shew how property in this country may be acquired, possessed, and transferred. To most of you, it may be presumed that the study of the law in any of its branches is recent, if not entirely new,—and it may not be without advantage, if at this stage of the student's progress, we glance backwards upon the pursuits which have hitherto engaged his attention, and inquire what prospective bearing these may have had upon the labours to which he is now to devote himself—how the acquirements already made may assist him in attaining his present object—and whether, while he is striving to become a lawyer, the studies of by-gone years have any longer a claim upon his regard.

Until the period which introduces the student to professional training, the design of his education is the general formation of his intellectual and moral character. His lessons, as regards their subject-matter, take an extensive range. They relate to the mind, and its affections and powers, and address him through the medium of literature, history, and philosophy. They relate also to external nature, its elements, and man's power with respect to these, in their use, direction, and control. These are wide interests, and in such pursuits the student is necessarily brought into contact with the master-minds, who have most intimately known Nature, and have spoken her language so well, that in succeeding ages men have with one assent accepted them as her interpreters, and cherished their productions as those which, next to the pages of Inspiration, they would not willingly let die.

GENERAL EDUCATION, AS PREPARATORY TO PROFESSIONAL.

RETROSPECT OF PAST STUDIES.

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The results of such studies cannot obviously be claimed by any one profession exclusively for itself. They have an influence for every calling, and are, in some degree, an indispensable pre-requisite to those vocations in particular, which require intellectual culture and effort.

Now, from the various paths, which, well trod, lead to usefulness, and profit, and honour, the student is here selecting the one which he is to follow through life, and henceforth, therefore, his studies will not, as hitherto, have for their only object general mental cultivation, but they will assume a definite character and direct application suited to his now determinate views. The desire to excel in languages or science will receive a new direction and impulse, and will either be accompanied by, or give place to the thirst for legal knowledge and skill.

Does the law student, then, by entering upon this path bid a final adieu to literature and science? It is, indeed, too common for him to do so, but a slight reflection will shew, that he is urgently called to a continued cultivation of these pursuits, not only upon general grounds, but by a consideration also of what is due to professional accomplishment and success. To throw away at this stage his classical knowledge, and such introduction to science as he may have obtained, is certainly to sacrifice a great source of mental enjoyment, a powerful implement of continued intellectual culture, a medium of communication with the finest minds of former ages, as well as of the present. There are some who conscientiously withhold their approval from the cultivation of the dead languages; and those, whose minds have been enriched with a better learning than the classic page unfolds, feel with the pious Augustine, that even in Cicero there is a void for which no eloquence can compensate; but, however alloyed with human imperfection, there is here a fountain of excellence, whose invigorating qualities have commended it to the human mind in many succeeding centuries; and these writings have been preserved more carefully than others, both because they were intrinsically better, and because they have more important uses. Into such uses this is not the place to inquire, but even here we ought not to forget the aid which learning has always afforded in the investigation, preservation, and diffusion of Sacred Truth, and how powerfully the cultivation of Greek and Roman literature has, at the most important periods of history, tended to liberate the mind from superstition and error, to awaken its highest energies, and to aid it in the reception of a pure and simple faith.

The advantages derivable from the prosecution of liberal studies by that branch of the legal profession with which this Chair is more immediately connected, will be best appreciated by attending to the nature of a Conveyancer and Law-agent's business. Let us advert, then, shortly to the functions which the members of this profession are called to execute.

The path of the Conveyancer does not at its entrance present the attractions of those leading to some other professions, and it is unsuited to minds which can only be satisfied with the stirring life of the soldier, the excitement of commercial adventure, the profound researches of science, the eloquence of the pulpit, or the intellectual strife of the bar. Yet the Conveyancer's calling, combined as it is in Scotland with the other business of a Law-agent, is not destitute of excitement or interest; and how absorbing and intense these may be, is best known to those who have most faithfully discharged its duties.

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DUTIES OF THE
CONVEYANCER
AND LAW-
AGENT.

What is the general nature of these duties? As a Conveyancer, the Law-agent must insure his client's safety in purchasing property, in selling it, in investing money with or without security, and in all the various circumstances and positions in which property is transferred from one owner to another, or made the subject of temporary or permanent arrangement or negotiation. In particular, he must advise and act in the arrangement and execution of family-settlements for the distribution of property, whether such settlements are made by parties jointly, and to take effect during their lives, or by individuals for the disposal of their means after their death. Here he is responsible both for the security of the rights created, and for the exact attainment of the intentions of the parties. As solicitor and attorney again, he must advise—either upon his own responsibility, or with the assistance of counsel, whose aid he must know when it is necessary to obtain,—in matters of disputed right, instituting actions when necessary, and conducting them with minute attention to law and facts, and to the forms of Court. He will be called upon to enforce judgments of the Courts, in order to vindicate his client's right against the property or person of his debtor—proceedings inferring a high responsibility. There will be expected a general attention to his client's property and interests, the care of which may be entirely devolved upon him, maintaining his just rights, defending such as are assailed, watching over those which are precarious, and giving the benefit, not only of his professional knowledge and skill, but of the care and anxiety also, which a prudent man bestows upon his own affairs.

IN TRANSMIS-
SION, AND CARE,
OF PROPERTY.

These are duties, obviously, which affect men's most important temporal interests. Property of great magnitude is dependent upon them, and professional skill is equally necessary where the value is small. The prosperity of individuals, the security of the estates which they have inherited or acquired, the comfort of families, happiness in the domestic relations, and tranquillity in circumstances of trial and anxiety—all and each of these interests, which come so home to men, to their hearthstones, and their bosoms—are committed to the Law-agent's keeping; and as by his attention and skill they

INTRODUCTION. are rendered secure, so by his negligence or ignorance they may be endangered or sacrificed.

CHAP. I.

IN ADVISING.

Nor is it only in the magnitude or the momentous nature of the interests committed to our care as Law-agents, that we find sources of professional anxiety and responsibility. The relation between agent and client is in many respects peculiarly delicate, and it involves duties which may be difficult and trying. A counsel gives his opinion deliberately upon the statement before him, unembarrassed by the presence of the party. But the agent must take the case from the fountain-head, extracting what is material from the mingled mass of passion, partiality, and incoherence presented to him; and here every faithful agent feels how ill he would acquit himself, were he to join his client with the zeal of a sympathizing partisan. He must, in his own mind, try the whole case by anticipation, scrutinize it with the eyes of an adverse party, and exercise the impartiality of a judge in forming his opinion, and imparting his advice. Thus he will rescue his employer from the effects of what may be his own ignorance and perversity, and he will be faithful in advice, even should he have to confront in his client's person the demon of undisguised Selfishness, regardless of every consideration but its own ends.

THE CONFIDENCE PLACED IN THE LAW-AGENT.

Again, the law-agent's position necessarily procures for him a large and implicit confidence. His professional knowledge gives him authority with his clients, and they have no alternative but to trust him. In the enjoyment of this confidence he possesses a power which, if not beneficially used, may lead to consequences the most pernicious. One false step, the permission for a moment of a tendency towards what is tortuous or doubtful, may be the launching into a sea of litigation, fruitful no doubt of emolument to himself, but involving his client in loss, embarrassment, and eventual ruin.

SELF-DENIAL.

SELF-DENIAL is an indispensable quality in this profession. There is none which more imperatively demands the exercise of that virtue, because none presents more powerful temptations to forsake it. One of the Law-agent's first lessons must be to possess himself in the face of the strongest temptation, to detect and resist the most insidious suggestions and disguises of self-interest—that momentary indulgence which is the parent of lasting remorse—and to pursue the path of duty, passing by the glittering heaps of possible but forbidden gain without a regret, and conscious of a reward higher than the “*regnum et diadema*” promised by the Poet to him,

“ Quisquis ingentes oculo irretorto
Spectat acervos.”

The practitioner, who is enticed to enter within the gate which conducts to lucre, but excludes a single eye to his employer's interest, may leave behind him all hope of honourable preferment, and all hope of a dearer possession, viz., his own self-respect. He is betraying

confidence the most exuberant, and deserting the cause of that morality, of which by his profession he is constituted a guardian. Such a dereliction, when it becomes general, is a sure symptom of the corruption of manners. In the decline of the Roman Empire, the cunning, ignorance, and unscrupulous rapacity of her lawyers was one fatal indication of her departing glory. It may be long ere a difference of opinion will cease to exist regarding the real sources of the French Revolution in the last century, one of which the eloquent observer of that event found in the commission of legislative powers to "the ministers of municipal litigation, the fomenters and conductors of the petty war of village vexation." But no one will be disposed to question upon general principles the soundness of the opinion implied, when he asks, "Was it to be expected that *they* would attend to the stability of property, whose existence had always depended upon whatever rendered property questionable, ambiguous, and insecure?"

I am not aware that any writer has described specifically the benefits arising to a community from the possession of lawyers sufficiently learned and skilful in their respective departments, and exercising their functions under the influence and control of a liberal education and high principle. It is as in a member of the human body. While it is sound and acts healthfully, we are unconscious of its acting; and it only attracts notice when disabled or affected by disease. But the advantages of skill and a pure morality in the legal profession are sufficiently obvious. In important transactions, and in all such matters as men conduct under advice, the law-agent is necessarily present, his influence is felt, and his character must give a tone and colour to the spirit in which the business is conducted. If then he is truly animated by the spirit of an enlightened jurisprudence, which has been well defined "the collected Reason of ages, combining the principles of original Justice with the infinite variety of human concerns," it will devolve upon him, in a form and in circumstances the most impressive, to give a practical exposition of the morality from which Jurisprudence is derived. It is his occupation, and his duty, to investigate the boundaries of right and wrong in human conduct, and he is, therefore, a guardian posted at their turning-points and dangers, and has it largely in his power to temper with humanity the severity which legislation may have failed to obviate, and to secure the influence of that portion of the moral law, which, in the language of Bacon, comes from a source too sublime for the light of Nature to penetrate.

The duties which have been described are no doubt arduous, and I request your attention for a moment to some of the qualities which are necessary to secure their right fulfilment. Some of them are more or less dependent upon natural constitution—others are acquired by study—all of them may be strengthened and improved by self-government and discipline.

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ADVANTAGE OF
SKILFUL LAW-
YERS, LIBERAL-
LY EDUCATED,
AND HIGH-
PRINCIPLED.

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CHAP. I.

QUALITIES ES-
SENTIAL IN A
LAW-AGENT.—
1. SENSE OF RE-
SPONSIBILITY.

The Law-agent ought to possess a strong sense of responsibility, and this not merely with reference to the magnitude of the interests committed to his keeping ; it is a necessary element and condition of his position, as the guardian of another's rights. His aim should be, as much as possible, to attach to the matter which he undertakes, the same importance which it holds in his employer's mind, but divested of the natural anxiety of personal interest.

2. SELF-POSSE-
SSION, &c.

He ought to have the qualities of self-possession, promptitude, and decision. It is of great moment, that, in circumstances which overwhelm the client's mind, and paralyse its powers, he should have in his law-agent the benefit of the calm judgment, which such circumstances chiefly require. Such a judgment is valuable at all times, unspeakably so in sudden emergencies, when there may be a necessity for immediate action ; and the law-agent will be called on to act in such emergencies. Misfortune, crime, death, come without notice, and afford no time for deliberation. At such a crisis, inaction may be ruin. Hesitate, and opportunity may be irretrievably lost.

3. VERSATILITY.

The mind must be trained to versatility in applying itself without discomposure to various matters in succession, to patience in tedious investigation, and to willingness in exchanging, at the call of duty, what is interesting for employment which may be dry and irksome.

At the same time there must be an ability to command the attention in the midst of distracting circumstances and interruptions, and to give deliberate consideration to matters too important to brook delay, and too difficult to be disposed of upon a cursory regard.

4. MEMORY.

The memory must be carefully cultivated, and habituated to retain the salient points of business matters, which form landmarks to their respective details. Without this faculty, accompanied and aided by practical method and order, there is too much reason to apprehend confusion and bewilderment.

It would be proper, if time served, to dwell upon the necessity of accuracy in the smallest matters, and uncompromising reverence for Truth, not as a speculative principle, but as a supreme and inflexible condition of every transaction and in all circumstances.

Such is a brief sketch of the Law-agent's duties, and some of the qualities which he ought to possess. Of the perfect discharge of these duties, or the complete possession of these qualities, it may be difficult to find an unexceptionable example in the same person. Some of them we are taught by the experience of defects in ourselves, and the observation of excellence in others. And since the duties of this profession are so important, and in some respects arduous, it is of moment to ascertain how the student may equip himself for the proper discharge of them.*

* In place of the foregoing sketch of the duties and qualities of a law-agent, Professor Menzies occasionally substituted the introductory remarks which will be found appended in the shape of a note to this chapter.

The most obvious and the primary qualification is a knowledge of the Law, its principles and practice ; for without this there can be no professional influence or respect. How is this knowledge then to be obtained ? It is to be drawn from various sources ; and of these the one which first challenges attention is the Feudal Law ; but, as the nature and details of that system are fully discussed in another portion of these lectures, I shall not further enter upon that subject here, than to observe that it is indispensable for the Scotch Conveyancer to form an intimate acquaintance with the feudal system, because his professional duties demand that he should exercise an independent judgment, and act upon his own responsibility, in the important business of sale, mortgage, and settlement, where the security of the parties depends upon an accurate observance of feudal rules and practice, both in the previous title, and in the instrument by which the transaction receives effect.

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QUALIFICATIONS FOR PROFESSION OF A LAW-AGENT.—
1. KNOWLEDGE OF LAW.
FEUDAL LAW.

The next great source from which our laws are derived is the Roman Jurisprudence. As Greece subdued captivated in turn her fierce conqueror by the charms of art introduced into his rude home, so, although Rome succumbed to the barbarian, her laws survived, and, in the language of the historian of her fall, "The public reason of the Romans has been silently or studiously transferred into the domestic institutions of Europe." The student has contemplated this vast empire in the height of an all-absorbing power, and has witnessed her excesses and inhumanities, marvelling at the mysterious force of that ascendancy which impressed its spirit even upon her victims, as when the gladiator contributed to the effect of her spectacles, not only by his death, but by the words with which he addressed himself to it, "*Moriturus Vos saluto.*" In the pages of our own literature too, the student has dwelt with admiration upon the poetical justice which has given a voice, prophetically armed with the destruction of an empire, to the expiring sigh of the butchered Dacian. These associations will lend an interest to the pages of our own jurisprudence, when the student finds her, who so afflicted her provinces, now instructing the inhabitants of the same regions in the arts of peace ; teaching civilisation and freedom to assert their claims ; elevating the rights of the *person* in opposition to a system which all but disregarded every right not connected with the feudal tenure ; mitigating the sternness of harsher rules by the introduction of her equitable *beneficia* ; and rescuing even the heir, that exclusive favourite of the feudal law, from the blindness of its excess, by enabling him to limit his responsibility so as not to exceed the value of the inheritance.

A third source of the laws, whose practical application is to occupy our attention, is that body of rules known by the name of the Law Merchant—the produce of times comparatively recent, in which men

LAW MERCHANT.

INTRODUCTION. of different nations, taught by their mutual wants, and their ability reciprocally to supply these, have consented to receive the lessons of a common brotherhood. This is the part of the law which is least tainted with imperfection, because it is founded upon a universal perception of what is just. Taking its origin in the necessity of a system of rules independent of the municipal laws of different nations, in order to render practicable the interchange of commodities, it was unavoidably based upon principles to which all could assent, and the pure equity thus derived from, and corrected by, the Common Sense of nations, has exercised, and is continually exerting, a powerful influence upon our municipal law in all its departments. The student will observe with surprise and interest that the simplest of all legal instruments are those devised to embody transactions between the subjects of different governments, and that mutual trust, that important element and aid in all negotiation, has nowhere a larger place in business than between those who by residence are strangers and aliens.

**STATUTES,
DECISIONS, AND
INSTITUTIONAL
WRITERS.**

Derived mainly from these sources, and from the authority of inveterate custom, the law is to be found and learned by the student in the statutes of the Scottish and British Parliaments, the decisions of the Judges in the Supreme Courts, and Court of Appeal, and in the works of institutional writers.

**2. ACQUAINT-
ANCE WITH THE
BUSINESS AND
AFFAIRS OF
LIFE.**

But it is necessary, in order to render legal knowledge effectively serviceable, that the student obtain an acquaintance also with that upon which his professional attainments are to operate, viz., the business and affairs of life. It is easy to perceive how fruitless were the labours of the Physician, if he studied merely the qualities of herbs and the other appliances of his art, without acquiring at the same time an intimate knowledge of the human frame, its parts, their functions, and the various influences by which they are affected. The spiritual physician also, whose inquiries are confined to the rules of a systematic theology, is but half prepared for the exercise of his all-important duties, if he have not likewise acquired some knowledge of that which it is his object to impress, viz., the heart of man, of his moral capabilities, the modes in which these may be blunted and perverted, and the influences which are powerful to alarm, quicken, and impel. So the Law-agent, who is well read, a master of the institutional writers, and not unacquainted with the statutes and decisions, has provided himself only with a weapon to cut the air, if he is ignorant of the arts, employments, and transactions of life upon which legal rules and instruments are designed to act.

This is to be understood, no doubt, within practicable limits. As "Life is short and Art is long," it is but little that can be thoroughly attained even when the whole energies are concentrated upon one subject. But although this is true in a strict sense, and with refer-

ence to the profound investigation of nature and science, it is equally true that a wide extent of general information, available for the ordinary purposes of life, may be attained by moderate exertions and diligence; and if we glance at any of the particular transactions which are carried into effect by legal instruments, the advantage of such general information is sufficiently obvious. Thus a practitioner who has been at some pains to acquire a knowledge of agriculture both in principle and practice, is qualified to execute his employer's instructions in preparing a lease of land, with a confidence and practical intelligence unknown to him who has no resource but the rules of law and the Book of Styles. In like manner some acquaintance with geology and mining will give important facilities when the duty is to write a lease of minerals. When a contract of copartnery is to be framed, the peculiar risks incident to the business to which it relates, will be best guarded against by a Conveyancer who knows its nature and details, and can therefore secure the whole partners from external hazard, and each partner from dangers which may result from the conduct of the rest.

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KNOWLEDGE OF
AGRICULTURE.OF GEOLOGY,
&c.

Enough has been said to shew how desirable it is for the young Conveyancer to cherish and improve his general attainments in literature and science. Brought by his vocation into communication with minds of all degrees of accomplishment and power in relation to subjects and interests the most diversified, and thus called to a position which, to those who confide in him, may result in much of good or of evil according to his principles of action, his completeness of attainment, his powers of clear statement and reasonable persuasion, it may be assumed that no study or qualification will be misplaced which enlarges his information, quickens his perceptions, strengthens his mental powers, and gives him a knowledge of men, their characters, their motives, and the means by which they may be influenced. General attainments, combined with professional skill and high principle, give to character a force, and a weight to advice, which are more readily felt than explained; and when these qualities meet in a practitioner whose distinction it is that he is *doctus componere lites*, they derive an influence peculiarly strong from the disinterestedness of his conduct.

3. GENERAL
ATTAINMENTS IN
LITERATURE
AND SCIENCE.

If, again, we confine our view to the effect of a liberal education in connexion with the study of the law, there can be no doubt of the advantages of a well-furnished mind in mastering a system derived from sources so remote, so extensive, and so diversified. The common sense of mankind has always connected learning with the profession of the law. Learning is regarded as the peculiar property of the Lawyer, and his professional characteristic. Accordingly, when, at the instigation of the House of Lords, the writs issued for the Parliament held at Coventry in the sixth year of Henry IV. prescribed

INTRODUCTION. that no apprentice or other man of the law should be elected a knight of the shire, it was on account of this exclusion, that the Parliament so returned received the name of *Parliamentum indoc-tum*, or lack-learning Parliament. This is not the occasion to advert to the refinement imparted to the pleader, and the aid more or less direct which he may draw from the models of ancient eloquence; but it is evident that no practitioner in any department of the law can obtain a thorough legal education without a knowledge of Latin.

KNOWLEDGE OF LATIN INDISPENSABLE. That language is essential to the intelligent perusal of the institutional writers, and of the other books of authority in which the rules of the Roman law are constantly encountered in their original garb. It is also one of the Conveyancer's duties, though now less frequently than before, to prepare instruments in Latin, and render the contents of deeds into that tongue. A failure in the performance of this duty may be productive of consequences the most serious, and of this the Reports of decisions furnish a recent and striking example in the case of *Cathcart v. Maclaine*, 1st July 1846. This was a case of entailed property. The entail had been correctly framed, its terms having been decided in the Court of Appeal to be sufficient and effectual to secure the estate to the series of heirs named by the entailer. The deed had also been properly recorded in compliance with the statutory requirement to that effect. But the Act 1685 concerning entails enjoins, that the clauses which are required to guard the estate against the claims of creditors, and the deeds of the heir in possession, shall be inserted not only in the entail, but in the other titles also of the estate, and that they shall be repeated in all the subsequent conveyances of the estate to any of the heirs. Now, as the estate in question was holden of the Crown, it was necessary that the titles should be in Latin, and upon an investigation of the Latin deeds, it was found that the prohibition to contract debt had not been accurately rendered, and was not expressed by any equivalent Latin terms; and as the estate had been possessed for more than forty years upon titles which did not thus contain an effectual prohibition to contract debt, it was found liable to be affected by the claims of creditors, to the disappointment of the heirs called by the entailer. Here, therefore, we have the intended destination of a large property defeated by a defective knowledge of Latin in the law-agent who made the translation, or received it as sufficient.

It would be easy to trace a particular utility in every branch of a liberal education as applied to professional training and practice.

MATHEMATICS. The Mathematical habit, exact and demonstrative, is precisely suited to the examination of the feudal progress of titles, whose validity depends upon the soundness of every link in the chain, as well as upon their proper connexion with each other. If Logic has been studied, the retention of its principles will be of invaluable service.

LOGIC.

When the student is least aware that he is practising them, its rules will be unravelling the complicated mass of entangled circumstances, enabling him to distinguish truth from error, and saving much time and labour by methodizing study and investigation.

And, as has already been seen, any pains bestowed in attaining or preserving even a limited acquaintance with Natural Science will find an ample reward, not only in a general intelligence and power, but directly and strikingly in professional duty. The Law-agent is every day liable to be called upon to conduct a party's defence against perhaps an alleged breach of the Excise laws, or it may be to vindicate or impugn a right dependent upon a scientific discovery, or to manage a case involving medical evidence. It is, no doubt, obvious, that it would be vain to attempt so to conduct a professional education as to fit one at once to enter with intelligence upon the details of matters which demand a separate professional training of their own. But mark the advantages with which an agent of liberal attainments will address himself to such a duty when it occurs. He does not, indeed, know the by-paths of science, but his studies have introduced him to its grand outlines and landmarks, and by the aid of these he will thread his way with comparative ease and confidence, where a mind not so prepared would yield to helpless perplexity.

I content myself with these brief remarks upon this point, which is of great importance with a view to professional respectability and influence. The subject has been treated at full length, and the opinions of the best writers collected, by Mr. Warren in his "Popular and Practical Introduction to Law Studies"—a work written with great spirit and full of instruction, and which, although addressed in some parts exclusively to the legal profession in England, may be perused with benefit by those in this country who are entering upon the study of law, and desire to conduct it on right principles, and with elevated views.

The last, and an indispensable requisite to professional education, is Practice. It is not enough to obtain general accomplishments, and to amass a theoretical knowledge of law drawn from reading and study. That knowledge must be rendered practical and real, by a testing process, in the course of its acquisition. Thus, while the student draws his conclusions from inquiry and reflection, he makes these conclusions fixed and established possessions, by seeing them applied, illustrated, and justified in actual business. A knowledge of this serviceable and complete description is only to be acquired by earnest study and diligent perseverance, with a determination too strong to be overcome by difficulty or discouragement. The student of Conveyancing is in general favourably circumstanced for carrying on the combined examination of principle and practice, his legal studies being simultaneous with his attendance in chambers, where principles may daily be seen carried into effect in the transactions of

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NATURAL
SCIENCE.

4. PRACTICE.

INTRODUCTION. actual business. And as theoretical knowledge needs to be confirmed by practice, an exclusive attention to practice, without regard to the study of the principles of law at the same time, is not less to be shunned. It is of great moment that legal study should commence when the mind is yet elastic, and unoccupied by those formalities which obstruct the admission, or usurp the place, of principles. The reproach of our profession is an alleged subjection to technicalities. If a rigid attention to legal forms necessarily involves this reproach, we must be content to bear it, for that observance is the safeguard of our client's rights. But it is quite possible to observe forms rigidly, and yet to have a clear understanding of principles. In portraying the character of Hannibal, Livy ascribes to him "*ingenium ad res diversissimas parendum atque imperandum.*" He had genius to command, but he could also practise obedience as well as his own humblest follower. Let it be the young Conveyancer's object, not only to possess a thorough knowledge and ready command of the principles of his art, from their sources in antiquity to their latest modifications, but to observe its forms with a scrupulous obedience and the minutest exactness. Thus, technicality will be no reproach, for form will be only the expression of the principle; and, as the example will be guided by the rule, it will, in turn, illustrate the rule, and so principle and form will mutually enlighten and preserve each other.

**NATURE OF THE
INSTRUCTION
IMPARTED FROM
CHAIR OF CON-
VEYANCING.**

What portion of the knowledge requisite to the conveyancer is to be taught in this place? This is not a chair of pure law. That is taught in the classes for Roman Law and Scotch Law; and the Society by which this chair is endowed has shown its sense of the necessity of these classes, by making attendance upon them a condition of admission to its ranks. The lessons there taught are undoubtedly the best foundation for the attainment of a thorough knowledge of Conveyancing. For the business of this chair is to impart a knowledge of that portion of the combined law and practice, by which instruments affecting property are regulated, and their form and effect determined. Although, therefore, we cannot here undertake or pretend to teach the abstract doctrines of law, it results from the nature of the subject, that we must examine every statute, every leading decision, and the *dicta* of the institutional writers, which prescribe, or in any way affect, the terms of legal instruments, or the consequences which result from their execution. But there is much in our system of deeds which does not receive its shape or its illustration from positive law. On the contrary, the styles of Conveyancing are in many and important particulars older than the statutes, and require a separate and independent study, without which neither the deeds themselves, nor the enactments which relate to them, can be understood. The styles of writs form not only a large source of illustration, but a fountain also of authority, in every system of laws. It

is an observation common to institutional writers both in England and Scotland, that the forms of deeds lie at the foundation of the Common Law, and that, without a knowledge of these, the law cannot be completely understood. If we turn to our Land Rights, how much do they contain which cannot be comprehended until the light of bygone centuries shines upon it! In order to understand the conveyance of the nineteenth century, we must revert to the opinions and usages, the authorities and practice, which prevailed between the thirteenth and sixteenth. Nor has the necessity of this research been removed by recent statutes, which have much abbreviated our Land Rights, but have left them the same in effect, and still regulated by the ancient feudal principles. The "Act to Facilitate the Transference of Lands and other Heritages in Scotland" has shortened the conveyance only by transferring the full clauses to its own sections, and enacting that the same effect shall follow from the use of the brief form of words which it prescribes. The Act will in reality form, by implied reference, a part of every future conveyance; and the same study which was previously requisite to acquire an understanding of the clauses when they stood in the Disposition, is equally necessary, now that they have been transferred to the Statute.

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In writs relating to Moveable Rights, the meaning and effect of terms and phrases are equally involved in an obscurity which the doctrines and practice of a time long gone by can alone dispel. Take the simplest of them, the Personal Bond. Why do the obligants, in acknowledging receipt, renounce all exceptions to the contrary? Why do they renounce the benefits of Division and Discussion? and what do these terms import? These questions involve a reference to rules and maxims of the Roman Law, from which the doctrines referred to were directly borrowed. And if we advert to the effect of the Personal Bond, how is it that this deed, when it bears a clause of interest, is heritable in its nature, and moveable only for certain definite effects by the force of statute? That, again, is a question which can only be answered by a reference to feudal principles and practice.

The same minute attention which is due to the history and effect of *deeds* and *clauses*, must be extended to the individual *words* which they contain. There is no habit more dangerous than that of gliding into a mere obsequious observance of styles, satisfied with a general perception of their scope, though the precise force of their terms, when analysed, may not be exactly apprehended. It is indispensable to the Conveyancer, that he obtain a clear and distinct knowledge of the precise import of every term used in the construction of deeds, for how can he be certain otherwise, that he is not defeating the object which it is his duty to secure? Reason makes this sufficiently obvious in a case where interests the most important depend upon the appropriate use of a clause, a phrase, a word, it may

INTRODUCTION. be a syllable. But experience is at hand here also with her examples to enforce attention and instruction, and we could not have a more striking instance of the necessity of a minute and perfect apprehension of the precise sense and effect of terms, than in the case of *Eglintoun v. Montgomerie*, 14th February 1845. This was also the case of an entail, the prohibition to sell being qualified by the words "redeemably or under reversion." But these words describe only one kind of sale or alienation, viz, that which is made with a reserved power to the disponent to reacquire. In order effectually to exclude an absolute sale, the word, instead of *redeemably*, should have been *irredeemably*; and there can be no doubt that the intention of the entailer required the use of the latter word. But in consequence of this error alone, the strict interpretation of entails, as we shall afterwards find, not allowing correction by reference to intention, it was decided that the entail contained no effectual prohibition against sales. So that here the entailer's destination of large estates was defeated by the omission of one syllable of a word. No conveyancer may safely affirm, that such an oversight might not have happened in his own practice. In the pressure of business, in the iteration of forms, and in the habit, too easily acquired, of unconsciously using words without on each occasion distinctly apprehending their import, there are causes sufficient to prevent wonder at the occurrence of errors. The use which they serve is to admonish us to guard against them, by attaining a familiar knowledge of legal terms, and at the same time watchful and minute habits of attention.

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7 D. p. 425.

If, then, the purpose of this class were perfectly attained, no student would leave it, without having had the opportunity of learning the causes in history, and in the manners and customs of our forefathers, which gave birth to our legal instruments, and to that part of our jurisprudence which relates to them,—with the source and import of their form, and of the expressions and individual words which they contain; and he would have presented to him also everything in the statutes and reports of decisions and institutional authorities, which determines, modifies, or illustrates the terms and effect of any instrument, which in his professional career he can be called upon to frame. Within the limits necessarily assigned to our studies here, it would be vain to hope that this idea can be realized in a complete and satisfactory manner. It shall be my endeavour, however, in so far as time will permit, to trace the successive portions of the subject from their sources in History, advancing Civilisation, and Law, so that the student may not be ushered at once into the presence of a technical practice, of which, as regards their origin, the words are to him unintelligible, and the forms unmeaning; but may rather approach his important duties through the avenue of principle and intelligence, and have his acquaintance with the form and effect of

deeds based upon an accurate knowledge and clear perception of their first source and original purpose, and of the causes in positive law, fluctuation of legal opinion, or change of manners, which have given to them their present shape and significance.

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NOTE TO PAGE 6.

Professor Menzies occasionally commenced his Introductory Lecture with the following remarks :—

It would ill become me to address any remarks designed to affect the choice of a profession to those by whom that choice has already been made. Our business here is to prepare for the exercise of a profession already selected ; and however important may be the step of choosing a profession, that step undoubtedly yields in importance to the preparation for its duties.

At the outset of life, it is natural to compare the advantages of different professions, and the degrees of elevation so variously ascribed to them in the social scale ; and such considerations are important as regards the adaptation of his calling to the qualities of the person making the choice. But that variety of elevation which conventional rules assign to different vocations, exhibits its widest disparity to the eye which takes its view from the lower level of observation and sentiment. The inequality is lessened, when the spectator looks from above ; and to the reflecting mind, conversant with a higher sphere of thought and feeling, the distinctions of earthly occupations are wonderfully modified, when contemplated in the light of that upper atmosphere. The more deeply the inquiry is pursued, the more clearly does the thoughtful spirit perceive that true dignity and essential worth are internal, in the heart and character ; and that, whatever may be the impressions of others, whatever the effect of the habits and arrangements which currently obtain, he is nearest to excellence, be his profession what it may, who has the highest sense of what is pure and upright, and whose conduct and deportment are most in harmony with that perception.

Although, therefore, we are accustomed to associate degrees of importance and of dignity, and even of sacredness, with particular professions, it is manifest that there is no inherent virtue in any calling, capable of imparting dignity or honour, or worth or sanctity, to the person who exercises it, independently of his own character and conduct.

It is a consequence as well as a proof of Infinite Wisdom and Goodness, that the variety of human wants and interests provides a multiplicity of avocations suited to the infinite variety of human faculties and attainments.

The highest and most precious attribute, which is common to every

INTRODUCTION. profession, is, that it supplies and imposes a DUTY,—a sense of obligation not only in relation to our fellow-creatures, but chiefly towards Him by whom our faculties were bestowed, in order that His purposes might be accomplished in their exercise. It is that sense of duty which gives to every vocation its true value and respectability. Without it the most elevated professional walk can afford no true satisfaction; with it, the humblest calling possesses an inherent value, of which no external accessories can deprive it.

**NOTE TO
CHAPTER I.**

The intrinsic value of duty, irrespectively of the nature of our occupation, is illustrated by Milton in the Sonnet on his blindness, when, in allusion to the variety of service which God exacts, he says—

“ thousands at his bidding speed,
And post o'er land and ocean without rest.”

And adds—

“ They also serve, who only stand and wait.”

If from abstract speculation we turn to the living exhibition, there are recorded examples of those who, entering at an advanced period of life upon philosophical and literary pursuits, and following them with distinguished success, have in the strongest manner evinced the essential simplicity and dignity of their character, by attachment to professions the most humble, while walking in the highest fields of science. We read of Benedict Baudouin, one of the most learned men of the 17th century, that having for some years followed his father's profession, that of a shoemaker, he had no desire to forget that circumstance, but many years afterwards wrote a treatise on the Shoemaking of the Ancients,* in which the history of that craft was traced with much erudition back to the earliest period. It is recorded of a celebrated Italian writer, Gelli, that after obtaining so much distinction by his writings as to be elected Consul of the Florentine Academy, and to be appointed by the Grand Duke to deliver a course of lectures upon the poems of Dante, he still continued to work at his original profession of a tailor, which he, too, had inherited from his father; and the circumstance is alluded to with modesty, and even dignity, in the introductory oration of the course which he delivered before the Academy. No lesson of humility could be more impressive, no evidence more conclusive of the limits assigned to human attainment in its very highest efforts, than the reflection of our own illustrious Newton, when, after having outstripped every uninspired inquirer after truth, and while surveying nature from an altitude never reached before, he likened his own achievements to the effort of a child that had gathered a few shells upon the shore of an ocean vast and unexplored. And we have the best example of moral and intellectual eminence, combined with humility of occupation, in Paul of Tarsus, brought up at the feet of Gamaliel, and taught according

* *Calceus Antiquus et Mynticus*, 1615.

to the perfect manner of the law—furnished, too, with all the accomplishments of secular learning—and who, while engaged in labours of which the moral effects will never cease to be felt, yet when he found others of the same craft, abode with them and wrought, “for by their occupation they were tent-makers.”

It results from these considerations, that whatever importance we may attach to the choice of a profession, an infinitely higher consideration is presented in the professional man’s character and moral culture, which are indispensable conditions of his possessing weight and influence. Nor do we view these qualities as separate from his professional preparation and conduct. Moral principle—the feeling of what is right—cannot be dissevered from anything that the man thinks, or says, or does. From its very nature, that principle cannot exist in any degree of strength or purity, without maintaining a paramount sway—without asserting its presence at all times, and in every effort and undertaking.

In commencing, then, the work of professional preparation, it is above all important that the student regard the prosecution of his inquiries, and the use of every means for the attainment of knowledge and skill, in the light of DUTY. Other motives there are near at hand, and more or less exciting and permanent in their influence. Self-interest, the desire of reputation, the suggestions of ambition—all are at work, adapting their arguments to the varied character of men; in some acting as powerful, healthy, and reasonable motives, in others passing beyond the boundaries within which they may safely operate, and degenerating into habits undisguisedly sordid and regardless. It is a part of the mysterious dispensation of Providence that our nature should in any degree be amenable to such inducements as these; and, within due limits, their influence is salutary and commendable. But how infinitely does the principle of duty transcend all such considerations! These appeal to self and selfish interests, and go no farther; that appeals to the highest law of moral rectitude, and adjusts its dictates, not according to the eager demands of a blinded selfishness, but in accordance with what is prescribed by the Supreme Source of light and truth. The inferior motives respect only the visible and tangible. Duty has an unflinching reference to the law which it obeys, and to our own highest advantage as consisting in the observance of our obligations to God and to our neighbour, and in a regard to the everlasting future as well as the passing hour. The motives which relate to what is worldly and present are weakened or obliterated by age or change of circumstances. The principle of Duty, when preserved and cherished, gains strength by the progress of time, and attains its perfection when inferior motives lose their power.

How, then, is conduct to be regulated? what course is it to steer

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Is it not evident that the place of presiding influence must be given to Duty, and that motives of present advantage and personal aggrandizement must be subordinate to, and controlled and regulated by, that highest rule, and admitted or encouraged only to the extent which it permits. Thus the efforts of honest industry will have free scope, but will not be permitted to degenerate into cupidity and extortion. The desire of a fair reputation will be encouraged, while, at the same time, it is restrained within due bounds, and prevented from swelling into vain elation and self-conceit. It is thus that the considerations, by which the human mind is most easily and powerfully actuated, are kept in their proper place, and their operation directed and limited by that higher principle, which brings all our thoughts and actions to the bar of moral rectitude.

It is an obvious and unspeakably important advantage connected with the high motives here referred to, that their presence furnishes a guarantee, perhaps the best that can be obtained, that the object of our studies or other pursuits will be attained in a manner the most thorough of which our faculties are capable. It is a characteristic of duty, that it is not satisfied with superficial attainment, or with any degree of attainment, but that which is complete. When we are actuated by convenience or advantage, the desire of attainment has for its limit that degree which will suffice for the end we have in view, and the motive to attainment is exhausted so soon as we have got enough to serve the turn. But when the sense of Duty is the guiding principle, complete attainment is its only limit, and, in so far as ability and opportunity may serve, it will not be satisfied so long as there is left anything further to be attained.

There is no one to whom a habitual feeling of moral obligation can be more beneficial, or to whom it is more necessary, than to the Law-student. His profession—that branch of it in particular with which this Chair is more immediately connected—is only reached after long preparation and laborious study. At the outset he can have comparatively little perception of the bearing of his studies upon their future object. The subject is new, its language strange, and many of its terms hard to master and retain; and it is arduous to labour in acquiring rules, the practical use of which cannot yet be seen. There is required a spirit of patience, and of faith in your guides and instructors. You must for a time be content to take it upon trust that there is a meaning in what you hear and read, which you will fully comprehend by and by, although at present you understand it only imperfectly. The subject, also, is large, and, every time we meet, it will be necessary to discuss, in succession, important doctrines, every one of which is of consequence in practice, and must be mastered. You will observe, too, that there does not subsist in this pro-

fession that visible and obvious connexion between preparatory study and the results of professional practice which we readily perceive in other callings. In those, for instance, connected with physical science, or the direct exercise of skill upon material objects, the connexion between attainment and execution is obvious. The future sculptor can have no difficulty about the eventual bearing of the first rude stroke of the chisel made by his apprentice hand. Our profession does not admit of so ready a perception of the connexion between study and its results. Its preparations and accomplishments, in so far as merely professional, are brought from remote sources in history and legislation; they are to a great extent the result of ancient notions and ideas. The rules, too, with which we have to do are frequently arbitrary, and not founded in the nature of things; and they are thus very much confined to the knowledge of the professional man. From all these circumstances it plainly results, that the relation between present study and future practice is not only not obvious, but is in a large measure recondite and obscure. The student must necessarily, therefore, tread for some time a path which to him is dark and intricate and perplexing, sustained by faith in the experience of those by whom it has already been trodden. It need scarcely be remarked, that for an undertaking thus long in achievement, requiring so much of patient labour and steady perseverance, so much of confidence in a distant gain, as the reward of present toil, no motive can be dispensed with; nor can any circumstances be conceived more urgently requiring, or more aptly befitting, that highest motive of all, which lightens the heaviest labour, and renders easy the most arduous undertakings, by subjecting them all to their due place of subordination as matters of incumbent Duty, willingly undertaken and cheerfully performed.

If knowledge is rendered more complete by study being conducted under a sense of Duty, the benefit thus accruing to professional accomplishment is obvious; and it would be easy to shew how directly and strongly the considerations to which we have referred apply to the practitioner as well as to the student,—how essential it is that the polar star of his conduct shall be, not his own advantage, but his client's good. I shall not now enter upon that subject, however, as there may be an opportunity of submitting some considerations in connexion with it at another time.

At present we proceed to inquire shortly how the Law student is to prepare himself for the discharge of his important, and, in some respects, arduous professional duties.

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CHAPTER II.

ORIGIN OF THE RIGHT OF PROPERTY.

INTRODUCTION OF WRITTEN TITLE.

GENERAL PLAN OF THE COURSE OF LECTURES.

ORIGIN OF THE
RIGHT OF PRO-
PERTY.

It is not my intention to enter into any elaborate investigation respecting the origin and history of the rights of property. Such inquiries can only be speculative in their character and results. Things were appropriated by man for the purposes of necessity, of use, and of enjoyment, long before there was philosophy to discern, or art to preserve, the record of a process so gradual and silent. The subject, however, is one of natural curiosity and interest; and you will find it treated in two papers by Lord Kames, one in his *Historical Law Tracts*, and the other in his *Sketches of the History of Man*. It is also handled briefly in the first chapter of the second volume of *Blackstone's Commentary*, where the most probable conjectures are collected, and stated in a striking and felicitous manner.

OCCUPANCY.

Let it suffice to note one or two leading points. While the ultimate foundation of property rests upon the dominion which God gave to man over the creatures, it is agreed by all, that the mode and title by which things were originally acquired in possession and property was simple Occupancy. At first, while there were but few inhabitants, and things were possessed in common, the idea of property was limited to its temporary use—a state of matters happily compared by Cicero to a theatre, which is open to all, but each man has a right to the exclusive use of the seat he occupies for the time. Moveables, that is, things separate from the soil, are supposed to have been first reduced into property, being more readily capable of occupation, and more likely, in the infancy of society, to have labour bestowed upon them. Man's necessities (which are the guide to the most probable presumptions in this matter) lead to the supposition, that his food, the produce of the chase, the cave or shed which gave him shelter, and the clothes which covered him, would afford the earliest suggestions, as they were, no doubt, the first subjects, of individual property. This notion would necessarily be strengthened, as animals were for convenience gathered and kept with their progeny in flocks; and that

again led directly to the attachment of value to other things, of which we have an example in Scripture in the purchase and jealous preservation of wells. The earth, however, and pasture still remained unappropriated, as we see in the case of Abraham and Lot, and in Arabia and Tartary, and all uncivilized and uncolonized countries, where the ground and its fruits continue the common bounty of nature, and lie open to the exigencies of the next occupier. It is, no doubt, in your recollection, that an attempt was recently made to assert a preferable right to the Oregon Territory upon this plea of occupancy in the Congress of the United States of America. The increase of population, as men congregated for mutual aid and defence, and the necessity of procuring, from the same piece of ground, sustenance in successive years, introduced agriculture; and the right of property was a necessary accompaniment, since no one would cultivate a field, of which the possession was insecure. This is the dawn of civilisation, which arises with its laws and government, as valuable rights are created, and men discover that it is their mutual interest to protect them.

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There is a question among Jurists, whether the right of property arising from occupancy is founded upon the implied assent of all others to the seizure by him who first takes it, or whether it is not rather to be attributed to the labour which occupancy implies; but the solution of such a point is matter only of curious speculation, and not likely to involve any consequences of real practical moment.

Property being thus acquired by the first taker, it remains his, until he shall abandon it by barter, traffic, or otherwise.

The most effectual extinction of the right of property, according to our simplest conceptions of it, is effected by death, after which, the deceased's family obtain the possession, not from natural causes, but as the next occupants. This title was, in early times, so strong as to give the succession to domestic servants; of which an example is afforded, in Abraham's apprehension, that a servant born in his house might be his heir; and in Prov. xvii. 2, we read,—“A wise servant shall have rule over a son that causeth shame, and shall have part of the inheritance among the brethren.” The law of almost every country, however, has given the right of disposing of property *intuitu mortis*.

Such being supposed to be generally the origin and growth of the right of property, the next question respects the Title. By Title we mean, not the grounds upon which the abstract right is founded, but the evidence of the right—the means by which it can be made apparent, that the field which I occupy, and the goods which I possess, belong to me and not to another. In the rudest times, no doubt, before the institution of government, and even after the introduction of laws, where their operation was little felt, property depended upon

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the power to maintain possession. The scale, turned for the moment by the sword of Brennus, kicked the beam before a superior force ; and such is still the object and result of national contests, when war reduces society to its first elements, and submits possessions to the arbitrament of strength. The history, not very remote, of our own country exhibits, in circumstances which the arm of the law was too feeble to control, a return to what the poet calls

“ the good old rule,
 the simple plan,
 That they should take who have the power,
 And they should keep who can.”

POSSESSION.

There is no doubt that before, and in some countries long subsequent to, the introduction of letters, possession was the grand criterion of property, even after such an advance of civilisation, as guaranteed, by the social power, the right which individual strength could not have maintained. When, in the course of our studies, we shall come to contemplate the feudal system, it will be apparent how strikingly its provisions were adapted to give the strongest security to individual rights, long before written Titles were thought of.

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OF WRITTEN
TITLE.

But as society advanced, and the uncertainty, unavoidably incident to rights dependent upon memory and oral testimony, became more and more felt in proportion to the subdivision of property, and the variety of interests evolved by new circumstances and multiplying relations, it could not fail to be felt, after the art of writing had made some progress, how well that art was adapted distinctly to define, and faithfully to preserve, the evidence of rights connected with permanent property in land. We may have occasion afterwards to look into this more minutely. At present it is sufficient to state that it is an established doctrine of the law of Scotland, that without writing there can be no Title to land—a doctrine which, in conformity with the valuable habit of embodying great legal principles in a sententious form, is expressed by the maxim, “ *Nulla Sasina nulla Terra.*” How universal and unbending in its application this rule is, will appear when we come to treat of the title to heritable rights.

The same causes which led to the adoption of writing in the title of lands, combined no doubt with experience of the security obtained by that method, has gradually led to the extensive use of written evidence of Title in the other grand class of rights, which, from their nature and in contradistinction to the fixed rights connected with land, are called moveable. Certain obligations of a moveable nature require writing to their constitution by the express direction of law, as, for instance, obligations, in which it forms a part of the contract that they shall be in writing. Others, without the express requirement of law, are invariably reduced to writing from a regard to the security of parties, and the facilities which written obligations carry along with them

for preserving evidence of the undertakings they embody, and, as we shall afterwards see, for obtaining fulfilment of those undertakings.

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With regard to the contracts which do not by law or practice require writing in order to give them effect, the rules, by which such rights are constituted and transferred, are taught elsewhere along with the other doctrines of the Municipal Law. The peculiar province of this class is to inquire, what is the nature, and what are the legal requisites, of writings used in the constitution, transmission, and extinction of rights to property.

It is sometimes a question of difficulty to determine, which of two methods is preferable in teaching, viz., whether, on the one hand, the subject will be more impressively taught by stating first the Principle, which is in reality a comprehensive expression of an element common to everything which the principle embraces. This is called the *synthetic* method, and is exemplified in our school-books of grammar, which, instead of individualizing and simplifying objects to the young mind, commence with the abstract propositions, "What is 'grammar?'" or, "What is a part of speech?" The other method is the *analytic*, because it takes up, first, the dissolved or loosened parts, and from the examination of these in succession rises to the general principle. The latter method is the more easy and agreeable, and better calculated to interest and attract, since it carries along the intelligence from the outset. The other method is convenient for those whose minds have attained to some degree of strength, especially in a matter already in part known to them; and the synthetic form is that by which knowledge, in whatever way it may have been acquired, can best be retained. One of the most celebrated instances of its application is the classification in Natural History, which, on the ground of a common attribute, introduced the whale into the same class with the human species. In our labours we shall happily be exempt from any difficulty with regard to this point. It will, no doubt, be requisite to deal with principles and doctrines, but these, the knowledge you have already acquired, and your past training, will enable you with little difficulty to apprehend; and the doctrines with which we have to do, being either founded upon statute, or upon a large induction from facts and experience, or tested by numerous questions tried in the courts in order to ascertain their true import, we shall have the full benefit of analysis either in tracing the doctrine to its sources, or in reviewing the tests, which have been applied in order to determine its real nature. And in the treatment of the subject generally, it has been found by experience that the analytical method is that by which it can be most advantageously handled.

There has been considerable variety in the order, according to which the principles of Conveyancing, and the forms of writs, have been treated and exhibited by different authors. WRITERS UPON CONVEYANCING. SPOTTISWOOD'S "Introduc-

INTRODUCTION. "tion to the knowledge of the Style of Writs," which was compiled from forms used in the chambers of Mr. Hay of Carribber, Writer to the Signet, was deficient chiefly through unsuitable arrangement, being regulated by no apparent principle of connexion or of progression proper to the subject. DALLAS'S Styles had been published previously to Spottiswood's work; and the first part of these Styles was arranged upon a principle well calculated for use and instruction, beginning with the simple form of a moveable or personal bond; then giving the form of transference by assignation or translation; then the discharge to the granter, or to another party, combined with an assignation; thereafter forms of diligence for enforcing payment from the debtor's property or person; and so on until the debt was secured in legal form upon the debtor's heritable estate.

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Mr. Ross, in his Lectures on the Practice of the Law of Scotland, adopted the method thus exhibited by Mr. Dallas, beginning with the personal bond, and following it out in the same manner; and he pursued a corresponding arrangement, agreeable to the nature of the subject, in that portion of his valuable work which treats of heritable rights.

This method of treatment, so well adapted for the practical instruction of the Conveyancer, was exemplified in a yet more systematic form by Mr. John Russell, Clerk to the Signet, in his very distinct work entitled "Theory of Conveyancing," published in 1788. He treats first of rights constituted by writing, their form and essentials, including the attestation of deeds; then of clauses common to all deeds; next of personal obligations; next of the constitution of real or heritable rights; then of the transference of rights moveable and heritable; then of redeemable rights; next of succession; next of judicial transmission; and lastly, of the extinction of rights.

This order appears to be in the main the best adapted for the subject, exhibiting in their regular and natural order the successive legal steps and writings, by which rights and interests are constituted, transferred, modified, and ultimately extinguished; and it is therefore my intention to follow it generally, with such alterations in the details as appear calculated to simplify the subject, and bring out more clearly its parts and their relations.

**DIVISION OF
THE SUBJECT.**

In pursuance of this design, then, the subject will divide itself into three Parts; of which

The **FIRST** will treat of the things necessary to be observed in all Deeds, whatever may be the nature of the Rights to which they relate:

The **SECOND** Part will discuss the nature, forms, and effect of writings employed in the constitution, transmission, and extinction of Personal or Moveable Rights:

And the **THIRD** Part will describe the writings employed for the same purposes with respect to Heritable Rights.

I. The First Part—viz., the things necessary to be observed in all deeds—subdivides itself into five Heads, which I propose to treat in the following order, viz. :—

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SUBDIVISIONS
OF PART I.

1. Chapter I. will treat of the Preliminary Conditions to the validity of Deeds, that is, the Conditions requiring to be looked to before a deed is executed. These conditions embrace three subordinate classes :—
 - (1.) The capacity of parties to make or to receive deeds, or their incapacity by reason of imperfect age, infirmity, or alienation of mind, and other disabilities.
 - (2.) The subject-matter of the deed,—involving the questions, whether the matter of the contract be *contra bonos mores*, or forbidden by statute, or inconsistent with public policy, or otherwise of such a nature that the law will not allow it to be made the subject of a contract.
 - (3.) The validity of the contract to which the deed is to give effect—whether it be the real and intelligent act of the maker of the deed, or whether it has not been truly consented to by him, but obtained from him by error, force, or fraud.
2. The Second Head of the First Part will be treated of in Chapter II., and will relate to the Statutory Solemnities of Deeds ; these Solemnities being certain observances, required by the law in the execution of deeds, as a test that they are the genuine act of the parties subscribing them. Under this Head, we shall have occasion to enumerate those instruments which are legally effectual, although not executed according to the Statutory Solemnities, and which, on that account, are called Privileged Deeds.
3. Chapter III. will treat of the Third Head of the First Part, and relate to the general structure of Deeds, and to those clauses which are common to all, or to a large number. Here there will be occasion to examine the nature of Warrandice, and the purpose of the Registration of Deeds.
4. The Fourth Head, relating to the Delivery of Deeds, and showing in what cases Delivery is requisite, in order to their becoming completely effectual, will be considered in Chapter IV.
5. The Fifth and last Head under this Part will be treated of in Chapter V., and will relate to Deeds which, although imperfectly executed, are yet, in some instances, made effectual by the conduct of the contracting parties, according to the doctrines of Homologation and *Rei Interventus*.

By this arrangement, a broad foundation will be laid for an exact knowledge of those general rules and tests, which indispensably require minute and careful attention in the preparation of deeds, and

INTRODUCTION. the neglect of which forms the first and most effectual weapon of attack in challenging their validity.

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Our inquiries under the First Part will disembarass the other two, for the most part, of every consideration which is not peculiar to their special purposes in relation to the nature of the rights with which they are concerned.

**SUBDIVISIONS
OF PART II.**

II. In proceeding, therefore, with the Second Part, which is to embrace the writings connected with Moveable Rights, we shall examine—

1. In Chapter I., the Instruments by which moveable or personal rights are constituted, by the Bond or Obligation of one or more persons.
2. We shall, in Chapter II., inquire into the nature and form of the instruments, by which the right resulting from an Obligation, so constituted, may be transferred from the person in whose favour it is granted to a third party, and by him to a fourth, and so on ; and
3. In Chapter III. we shall show, by what deeds Obligations may be extinguished upon voluntary performance by the party, or by the voluntary act of the creditor in the obligation.
4. We shall, in Chapter IV., proceed to ascertain by what legal measures the performance of obligations may be enforced, when it cannot be obtained voluntarily.

Having thus traced the constitution, transference, discharge, and enforcement of Obligations constituted by deed, we shall next proceed to examine Bills and Promissory-notes in the corresponding stages of their creation, transmission, payment, and legal enforcement. Bills and Promissory-notes have generally been treated under the same heads as formal Deeds ; but they are writings so peculiar, and enjoy privileges so entirely their own, that I have thought it better to present, in a single view, all that relates to their character and privileges, negotiation, and extinction.

5. The Fifth Chapter of Part Second, therefore, will relate to Bills and Promissory-notes.

When we shall have arrived at this point in the examination of Moveable Writs, we shall so far have accomplished the object of that progressive and properly connected view of these instruments, of which, as we have seen, the example was first set by Mr. Dallas ; and we shall then proceed to examine the other writings under this head, in the order in which their forms are contained in the second volume of the forms of writs compiled by the Juridical Society.

6. The Sixth Chapter, therefore, will embrace Contracts—that is, Deeds of mutual obligation by two or more parties, including

that most important instrument, the Contract of Marriage, and relative deeds. INTRODUCTION.
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7. Chapter VII. will treat of the Conveyance of Moveables, where the right consists, not in an Obligation, but in the *ipsum corpus* of the thing conveyed.
8. Chapter VIII. will relate to Powers granted by parties in favour of others, to act in their behalf.
9. And, lastly, in Chapter IX., we shall treat of the mode in which Moveable Rights and Property are conveyed from the dead to the living, whether by Deeds executed *intuitu mortis*, or, where no such deed has been executed, by the act and disposition of the law.

III. The Third Part will embrace the Writs relating to Heritable Rights. SUBDIVISIONS
OF PART III.

In an Introductory Chapter, we shall take a review of the history of the Feudal System ; after which we shall shew the general results of that system as now found in the existing state of Heritable Rights in Scotland. We shall also examine the ancient form of Investiture, as containing the modern title in embryo.

The subject will then arrange itself under five heads:—

1. In Chapter II. we shall treat of the Constitution of Heritable Rights by Charter and Sasine, which we shall examine, and shew the rights resulting to the Superior and Vassal.
2. Chapter III. will relate to the Transmission of Heritable Rights, embracing—
 - (1.) Voluntary transmission *inter vivos* in its various forms, as determined by the position of the parties, or the nature of the right as existing in the granter, or intended to be constituted in the grantee—with the mode of completing such transferences.
 - (2.) Voluntary transmission *intuitu mortis*, including the Marriage Contract, where it contains heritage, the Disposition *mortis causa*, and the Entail.
 - (3.) Judicial Transmission, by Action of Sale, Mercantile Sequestration, and Adjudication in Implement.
 - (4.) Transmission to the Heir by Service and Precept of *Clare Constat*.
3. Chapter IV. will treat of Rights limiting the right of property or of use—Redeemable Rights, Liferents, Leases, and Servitudes.
4. Chapter V. will relate to Diligence affecting Heritable Rights—*Preventive* by Inhibition—*In security* by Adjudication—*In execution* by Poinding the ground.
5. We shall next, in Chapter VI., examine the Accessory Writs

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employed in the sale and purchase of Heritable Property—Missives and Minutes of Sale—Articles of Roup. Observations will be made upon the examination of Titles, the Prescriptive Title, and the Search of Incumbrances; and the subject will conclude with a general review of particulars requiring attention in completing the transfer and title.

PART I.

THE GENERAL REQUISITES OF ALL DEEDS, WHATEVER MAY BE THE NATURE OF THE RIGHTS TO WHICH THEY RELATE.

CHAPTER I.

PRELIMINARY CONDITIONS TO THE VALIDITY OF DEEDS.

A CONVEYANCE or Deed implies the intervention of two parties—one who makes or executes it, and is called the Granter, and another who receives it, and is named the Grantee. It implies, also, a property, or right, or obligation, which forms the subject-matter of the Deed. Now, in regard to these points, viz., the parties to a Deed and its subject-matter, the Law has certain requirements antecedent to the transaction—requirements which may be decisive in condemning the deed even before we look at its contents. There must be in the parties a capacity to contract generally, and a capacity to contract also with reference to the particular subject of the deed; and the subject-matter must be such as the Law permits parties to contract about. These are points which evidently require our earliest consideration, since there can be no effectual deed without parties capable to grant and to receive, and without a subject-matter susceptible of conveyance or other contract;—no Deed of Sale, for instance, unless there be one party possessed of a legal capacity to sell, another possessed of a legal capacity to purchase, and a thing legally capable of being sold.

PART I.
CHAPTER I.

1. *Capacity of Parties to make Deeds.*—It is indispensable to the validity of every Deed, that the party executing it be capable of deliberating, and of giving an intelligent and voluntary consent. A deed, emphatically *Factum*, the highest act which one can exercise in relation to his property, can only be granted by a person whose judgment is mature, and whose mind is sound, so that he understands what he does. This is a doctrine founded in the clearest principles of natural equity, which deny effect to acts alleged to have been done by a party, who was in reality incapable of performing such acts with a full perception of their effect, and a mature judgment as to their fitness; whether such incapacity results from

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nonage, or from the weakness incident also to old age, or from deprivation of reason, permanent or temporary, or from dependence of social position, requiring the aid of a stronger judgment. An interesting example of the application of this great principle of natural justice is presented in the Spanish Laws of the Indies, which provided portions of the soil of Louisiana to the Aboriginal Indians, and secured the value of such lands by preventing the intrusion of white settlers. But every Indian was considered as in a state of pupillage, being manifestly unequal, from his natural disadvantages, to cope with the children of civilisation. The public officers, therefore, were appointed guardians of the Aborigines, and the authority of these guardians was necessary to a valid alienation of their property. In Chancellor Kent's Commentaries on American Law, you will find references to the anxious and paternal care with which the Spanish Law guarded the Indians from abuse and fraud.

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INCAPACITY
FROM NONAGE.

PUPILS.

MINOR.

In our own Law the first disqualification with which we meet on this head is that of imperfect age. A person is incapable of contracting during the years of pupilarity, which, in a male, continue until the completion of his fourteenth year, and, in a female, until the completion of her twelfth year; and the powers of contracting, although not denied, are limited during the remainder of minority, which, in both sexes, ends at the age of twenty-one complete. These ages have been determined by law, in order to fix, by a definite criterion, the attainment of those degrees of maturity of judgment at the end of pupilarity and of minority, which, in the dispensation of Nature, are really bestowed at periods infinitely various. The term "minority," although in a special sense limited to the years between pupilarity and majority, is applied generally to the whole period of nonage. The father is the natural guardian of his child; he may appoint guardians to act after his death; and, in the event of his death without making such appointment, the Law provides guardians—a Tutor to the pupil, and Curators to the minor—who are appointed, in legal form, according to the rules minutely explained by Erskine in his Institute, *Book I. Title 7*. The Tutor's office includes the charge of the person and estate of the pupil; that of the Curator is *ad negotia*.

M. 8979.

A pupil without a tutor is incapable of contracting; *Bruce*, 24th January 1577. In that case it was held, that a renunciation by a pupil, seven years old, was null from the beginning without reduction, albeit that the pupil *tacuit per utile quadriennium*. And again, in a sale of entailed lands, authorized by an Act of Parliament which required certain heirs of entail to be made parties to the application for having the sale carried through, the next heir being a pupil, and no tutor having been appointed, that was held fatal to the validity of the sale; *Agnew v. Earl of Stair*, 31st July 1822. Upon the same principle, an effectual decree *in foro* cannot

1 Shaw's App.
333.

be pronounced against a pupil, unless his tutors appear, and plead in the character of tutors; *Craven v. Elibank's Trustees*, 9th March 1854. Pupils are exempt from imprisonment for civil debt by the statute 1696, cap. 41; but this privilege ceases after pupilarity; *Thomson v. Ker*, 27th January 1747. Such deeds, as it is competent for a pupil who has a tutor to grant, are not executed by the pupil himself, but by the tutor alone. An action, however, may be commenced in the name of the pupil alone, and the Court will appoint a *tutor ad litem*. Diligence used before such appointment is valid; the fact of its having been used in the pupil's name alone being no more a nullity in the diligence than in the process itself, which is regularly enough brought into Court first in the pupil's name, and the tutor afterwards appointed; *Johnston v. Johnston*, 16th January 1640.*

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16 D. 811.
M. 8910.
M. 16,346.

Tutors-nominate (i.e., tutors appointed by the father) have the highest powers known to the law. They do not require judicial authority for making up the pupil's titles; and in this and other acts of administration, they must act on their own responsibility. They do not find caution, nor are they, like Factors *loco Tutoris*, officers of Court. The Court will not, therefore, interpose its authority to their uplifting money, for which they do not find security, and for which they are not responsible to the Court; *Graham*, 21st January 1852.

14 D. 357.

The law does not impose curators upon a minor, excepting that the father, if alive, is the legal curator, or if the father have named curators, the appointment is effectual. When the father has died without appointing guardians, it is optional to a minor, upon attaining the age of puberty, to choose curators in the manner prescribed by Statute 1555, c. 35, or to act without them.† The deeds of a minor having curators are subscribed by himself, and by them as consenting.‡

But it is only within certain limitations that the law authorizes deeds affecting the estates of pupils and minors, who have tutors and curators. The power of disposal of their moveable estate does not appear to be restricted. But the sale by a tutor of his pupil's heritage without judicial authority is null; and such authority will be granted only upon grounds of the most urgent necessity. Any views

Ersk. i. 7, 17.

* A tutor *ad litem* is validly appointed to minors having interest in proceedings under the Entail Amendment Act, at any stage; *Kerr v. Marquis of Ailsa*, 12th June 1854.

1 Macq. App. 736.

† Factors *loco tutoris* are appointed to pupils, in terms of the Act of Sederunt 1730, upon summary petition. But the Court will not thus undertake the management of the estates of minors, who can choose curators. Accordingly, in *Macarthur*, 16th June 1854, and *Barron*, 17 D. 61. 16th Nov. 1854, the Court refused to appoint a curator to a minor upon a petition narrating that there were no next of kin on either the father's or mother's side who might be cited to the election.

‡ In the case of *Marquis of Hastings*, 13th July 1849, an application for leave to feu part of an entailed estate was made by the heir in possession, a minor, and his curators. The affidavit, produced in terms of the Entail Amendment Act, § 6, was subscribed by the minor himself. The Court recommended that, *ob majorem cautelam*, it should also be subscribed by one or more of his curators.

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of expediency or advantage, however probable or certain, will be disregarded, and the Court will interpose its authority only in circumstances of necessity, and upon the next heirs and the creditors of the pupil being brought into Court, not by summary petition, but by the solemn and deliberate form of an ordinary action. This doctrine is now so firmly established, that even if the Court has interposed its authority, the sale will, notwithstanding, be reduced, if it shall be shewn not to have been an act of necessity. Such a reduction was granted in the case of *Vere v. Dale*, 29th February 1804.* In 1787 the Court had authorized Mr. Vere's tutors to grant a feu of land, which was, in the words of the finding, "for the utility and advantage" of the pupil. The pupil was at this time six years of age, and upon attaining majority he challenged the sale as *ultra vires* of the tutors to make, and also *ultra vires* of the Court to authorize; and the sale was accordingly reduced "as being" (in the words of the judgment) "only an object of apparent advantage, but not of urgent necessity."† Upon the same principle, the Court refused to authorize a sale, where it was shewn to be a measure of the highest expediency, but no necessity was proved; *Finlaysons v. Finlaysons*, 22d December 1810; and in *Boyle*, 19th February 1853, they refused to authorize a factor *loco Tutoris* to grant a feu in circumstances of great advantage to his pupil's estate. The prevention of loss, however, in the pupil's property, constitutes necessity so as to authorize a sale of his heritage; *Muller v. Dixon*, 11th February 1854. In that case, the property was held by trustees under a marriage contract for a mother in liferent and her children in fee, and the report exhibits the procedure adopted in such circumstances to validate a sale. For the purpose of paying debts, authority was granted to *tutors nominate* to borrow on the security of the pupil's property, in *Bellamy*, 30th November 1854; and to sell the pupil's heritage for the same purpose, in *Mackenzie*, 27th January 1855. But, in *White*, 7th March 1855, a father having, as tutor and administrator-in-law, applied by petition for authority to borrow or sell, in order to pay debts affecting the pupil's heritable estate, the Court refused the application; and a distinction was taken between a tutor-dative or a judicial factor, whose cautioners will be liable for the price, when a sale is authorized by the Court or made by a creditor lending on

* "If the transaction were to be reduced and set aside by the pupil when he comes of age— which it may be, notwithstanding the special power granted by this Court, as was found in *Vere v. Dale*—the cautioner of the tutor-dative would be still liable for the loss, as may be inferred from the judgment against the cautioner in *Eaton and Cowan v. Murdoch*, 9th June 1826;" per LORD DEAS in *White*, 17 D. p. 602.

4 S. 688; affl.
3 Wil. and Sh.
App. 246.

16 D. 60.

† In *Mackenzie*, 18th November 1853, authority was refused to the tutor-at-law of a lunatic to sell a part of the lunatic's heritable estate, in respect that the necessity to sell for the interest of the lunatic was not established; and the strongest doubts were expressed as to the competency of proceeding by way of summary application.

power to borrow, and the case of a tutor, for whom the Court holds no such security.

A minor may, with the consent of his curators, alienate his heritable property without judicial authority, but the transaction will be challengeable by the minor himself, after attaining majority, and within the *quadriennium utile*, upon the grounds of minority and lesion—that is, hurt or prejudice. In order to guard against such a result, the authority of the Court has been anxiously sought by curators, and by parties dealing with minors. But such authority is not necessary, nor, if granted, does it exclude the minor's claim to restitution on the ground of lesion, and the Court will not, therefore, now interpose its authority in such transactions. It was refused in the case of *Wallace v. Wallace*, 8th March 1817. The minor must make F. C. his challenge within the *quadriennium utile*, when the ground of reduction is minority and lesion. But if, irrespectively of that plea, the deed is null upon other grounds,—as being granted, for instance, without consent of his curator,—then he is not limited to the four years; *Manuel v. Manuel*, 15th January 1853. 15 D. 284.

Deeds granted by minors who have curators without their consent are null, excepting in so far as it can be shewn that the minor was benefited by them—that what he got for granting the deed was *in rem versum*, turned to his profit, as, for instance, in his maintenance or education. There are various illustrations of this doctrine in the Dictionary under the head MINOR; and we may refer to *Stuart v. M.* 8943. *Stuart*, 23d March 1639, and to *Dennistoun v. Mudie*, 31st January 12 D. 613. 1850. The latter was the case of a minor dealing in railway shares to the amount of £50,000; but the Court assoilzied him, on the plea of minority and lesion, from an action, at the instance of a share-broker, for the balance of the account-current between them.

Even where his curators consent, the minor is entitled to restitution in so far as the sum has not been profitably applied. This was strongly exemplified in *Harkness v. Graham*, 20th June 1833—a 11 S. 760. case in which a minor eighteen years of age had granted bond and heritable security, with consent of his curators, for £4000, and his creditors were found entitled to challenge it on the head of minority and lesion, excepting in so far as the lender should prove that the money was *in rem versum* of the minor.

You will find the protection, granted to minors generally, well illustrated by the cases of *M'Michael v. Barbour*, 17th December 1840, 3 D. 279. where a minor managing the affairs of his father, who was incapable of attending to business, having granted his bill for a debt previously due by the father, the bill was reduced as not *in rem versum* of the minor; and of *Bruce v. Hamilton*, 23d December 1854, where an ante- 17 D. 265. nuptial marriage-contract, executed by a female in minority, but not by her curators, was found not to be *ipso jure* null, no lesion being

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proved. Lord Ivory observed :—"The nullity is pleaded to such an extent as to exclude an inquiry into the question, whether the deed was for her benefit. There are none of our writers on law who say anything as to this nullity, who do not concur in the qualification of the doctrine, that it is a nullity to be pleaded against injury, and where the deed is for the benefit of the minor, the nullity cannot be pleaded. . . . I do not think the doctrine of the nullity of a deed, entered into by a minor without consent of his curators, is so absolute as to undergo no qualification. There are other instances which might be mentioned, as shewing that the general doctrine of the nullity of acts done by a minor without his curators undergoes some qualification ; as, for instance, where the minor enters into a trade, or where the minor grants a bill, could it be said that such transactions, if the minor has curators, shall not be good ? I do not wish to impugn the general doctrine, that deeds, entered into by a minor without consent of his curators, are null ; but only to point out such modifications as the peculiar case of marriage calls for." The nullity of deeds, granted by minors without consent of their curators, was also qualified in the case of marriage-contracts, in *Davidson v. Hamilton*, 4th July 1632, and *Young v. Robertson*, 24th January 1769.

M. 8938.

Hailes, p. 265.

Tutors cannot alter the order of succession to their pupil's estate.

After the age of pupilarity, a minor can make a testament, that is, a deed disposing of his moveable property after his death, without the consent of his curators ; *Stevenson v. Allans*, 30th November 1680 ; but, even with their consent, he cannot make a settlement of his heritable estate ; *Clydesdale v. Dundonald*, 26th January 1726 ; *Cunynghame v. Whiteford*, 8th March 1797 ; because he is not, in the eye of the law, yet possessed of that deliberating mind, which is necessary to so important an act.

M. 8949.

M. 8964.

M. 8966.

From the deeds liable to challenge on the ground of minority, you are to except such as the pupil himself, if major, might be compelled to grant—the discharge, for instance, of a debt owing to the pupil's estate, which the debtor is entitled to pay ; *Graham v. Earl of March*, 31st January 1735. The Court, however, will not authorize a debtor to pay to a minor who has no curators ; *Kirkman v. Pym*, 1st August 1782.

M. 16,339.

M. 8977, and
Hailes, p. 909.

ii. 8, 100.

It is held by Bankton in his Institute, that a minor without curators may execute a presentation to a church.

It is very important to keep in view, that, contrary to the ordinary rule of law in mutual contracts, although deeds by a pupil or minor without consent of their tutors or curators have no effect against the minors, yet they are binding upon the parties who thereby contracted with them ; and that these parties may be compelled to implement their obligations under such deeds and contracts, if the fulfilment be deemed beneficial to the minor.

These are the chief points demanding attention with respect to the deeds of parties during their nonage ; but it must be kept in view, that it is impossible within the limits necessarily assigned to our inquiries here, to give a full exposition of the law relating to minority ; and that, in so far as it has been touched upon, the object is simply to shew the legal position of minors and their guardians as respects the capacity of granting deeds. This observation will apply also to the remarks which will be made as to other descriptions of persons whose capacity in this respect the law has denied or modified.

MARRIED WOMEN fall within this class. In the eye of the law, a woman, upon her marriage, becomes *persona nulla*, her person being, as it is said, sunk in that of her husband ; and she is, therefore, held incapable of undertaking any personal obligation. This is a doctrine which holds universally with regard to women during their marriage, and which it is indispensable for the Conveyancer to keep steadily in view, viz., that whatever other deeds she may competently grant, a wife cannot grant any deed of the nature of a *personal* obligation binding her during the marriage, and that, with the limited exceptions to be presently explained, the personal obligation of a wife is absolutely null. DEEDS BY MARRIED WOMEN.

By marriage the husband is constituted his wife's curator, and, in general, his consent is necessary to validate every deed which it is competent for her to execute. But his consent will not validate her personal obligation ; and, therefore, all bonds, bills, promissory notes, contracts, cautionary obligations, and other obligations by a married woman, with or without her husband's consent, are void ; and no ratification by her during the marriage will make them effectual. The Reports afford numerous illustrations of this principle. In the case of *Birch v. Douglas*, 14th January 1663, a personal bond executed by a wife during marriage, and subscribed also by her husband, was found null, although she had ratified it upon oath.* Among the authorities of recent date are the following :—*Lennox & Co. v. Auchencloss*, 19th May 1821 ; here a letter of guarantee by a married woman, containing a consent by her husband, was found null and ineffectual against her person and estate. In *Thomson v. Elder*, 4th December 1827, a bill accepted by a husband and wife was found not obligatory upon her, even after the husband's death ; and the effect of marriage upon the obligation of a woman is distinctly exhibited by the case of *Balfour v. Ewing*, 5th March 1831, where there were two bills, one granted by the party before her marriage, and the other afterwards, the second being a renewal of the first. It was found that the first bill was discharged, and that the second, although a renewal, being granted after marriage, could create no obligation.

* See Erskine, iii. 3, 60, for the principle upon which effect is not given to such oaths.

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M. 5980.
15 D. 451.

The inherent nullity of such obligations may be taken off by the party's homologation after she shall have become *sui juris* by the dissolution of the marriage; and an equitable relief has been extended to parties dealing with a married woman, to this effect that her personal obligation has been held to affect her separate property to the extent to which it can be shewn that the money has been *in rem versum* of herself; *Harvey and Fawel v. Chessell's Trustees*, 21st February 1791. On this principle, in *Gifford v. Rennie*, 1st March 1853, a married woman was held liable for expenses incurred on her employment with her husband's consent, in vindication of an alimentary fund belonging to her.*

Jus Mariti AND
RIGHT OF AD-
MINISTRATION.

By marriage two rights arise to the husband in connexion with his wife's property—the *Jus Mariti*, and the Right of Administration. These are sometimes confounded, but they are quite different from each other, and it is essential carefully to distinguish between them. The *jus mariti* gives to the husband a personal interest on his own behalf in those portions of his wife's property which are transferred to him by the assignation implied in marriage. Her moveables, for instance, are merged in the *communio bonorum*, which is subject to his sole control and disposal. The right of administration, again, is derived from the husband's character of *curator*. As guardian, he has charge of his wife's property as well as of her person; so he is entitled to levy the rents of her heritable estate, and these, when levied, fall under the communion of goods. But here it is chiefly important to remark, that, the husband being curator, the wife cannot dispose of her own property without his consent. This holds not only with regard to her heritable property, but as to such part of her personal estate also as has been exempted from the *jus mariti* by contract of marriage or otherwise. We shall find presently that the right of administration, as well as the *jus mariti*, may be barred by agreement, or discharged.

From the legal effects which have been described, it follows that, during the marriage, a wife, with her husband's consent, may dispose of the heritable estate belonging to her; but she has not that power with regard to the moveable estate, since, as already noticed, it falls under the *jus mariti*, and is subject to the exclusive disposal of the husband. The *jus mariti*, however, does not extend to paraphernal goods, that is, the wife's wearing apparel and ornaments, or to rights which belong to her exclusive of her husband, in consequence of his *jus mariti* having been renounced by contract, or by the deed under which she acquired the right.

But although the wife has power to dispose of her heritable or separate moveable estate, that power must be exercised, as we have seen, subject to the curatorial power of the husband, which power draws

* Other cases, in which effect has been allowed to a married woman's personal obligation, are given *infra*, p. 38.

back to the date of the proclamation of banns antecedently to the marriage. All deeds, therefore, which are done or granted by a wife without her husband's consent, are null, although they relate to her own separate property, and do not encroach on his rights, unless the husband's power of administration shall have been expressly excluded. In *Boyle v. Crawford*, 5th March 1822, a disposition of coal, of which 1 S. 372. the wife was proprietrix, having been granted by her in the absence and without the consent of her husband, it was reduced as *funditus* null and void. Upon the same principle, it is held by Erskine, that Inst. i. 6, 27. if the wife should, without her husband's consent, dispoise her lands under reservation of his *jus mariti* and right of courtesy, the deed would be void, because he is her guardian for security of herself and her heirs, as well as for his own right. In accordance with this principle, in the case of *Rennie v. Ritchie*, 25th April 1845, the House 4 Bell's Appls. 221. of Lords, reversing the judgment of the Court of Session, found that an assignation by a wife of a fund from which the *jus mariti* was excluded, was void, having been granted without her husband's consent during his temporary absence abroad. It is undoubted that, with the husband's consent, a wife may effectually dispose of her separate estate, heritable or moveable, and that such deeds cannot be challenged; *Clark v. Gibson*, 24th January 1826. Here a sale of an 4 S. 388. annuity by a married woman, with her husband's consent, was sustained against a challenge made by herself on the allegation that the money had been paid to her husband, and upon other grounds. In *Brown v. Bedwell*, 3d December 1830, an heritable security granted 9 S. 136. by a wife, with her husband's consent, for money advanced to him, was sustained. But the husband has no power to dispose of his wife's heritable estate without her authority; *Kennedy v. Watson*, 29th 11 D. 171. November 1848.

It is necessary that the husband consent to leases granted by his wife of her heritable estate, unless his right of administration be discharged; and it has been decided that the right of administration may be discharged, as well as the *jus mariti*; *Keggie v. Christie*, F. C. 25th May 1815. When, therefore, both the *jus mariti* and the right of administration are discharged, the husband has no right to challenge deeds granted by the wife without his consent; *Gordon v. Gordon*, 16th November 1832. In *Primrose*, 9th March 1850, the 12 D. 916. Court sustained a petition by a married woman for disentailing her property, though presented without the concurrence of her husband, both his *jus mariti* and right of administration having been renounced, and held her entitled to subscribe the deed of entail without his consent.

The *jus mariti* being an interest strongly founded in the Law, it can only be excluded by direct and explicit words. You will find an example of terms ineffectual to exclude this right, in *Cuthbertson v. Hume*, 205.

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F. C.

Pollock, 22d November 1799. If the wife is minor when she executes a deed with the consent of her husband as curator, she is entitled to challenge and reduce it upon the head of minority and lesion. It was so found in *Gibson v. Scoon*, 6th June 1809.

During a legal or voluntary separation of husband and wife, when the husband has settled an allowance for her maintenance, the wife's personal obligations receive effect, but not so as to subject her to personal diligence before the dissolution of the marriage. But when the husband resides abroad, and the wife carries on an independent trade in Scotland, she may contract so as to subject her person to diligence—an inroad upon the law of marriage founded mainly upon consideration for married women in such circumstances, since the public will more readily transact with, and trust, those who are subject to the ordinary liabilities. This doctrine was fixed by the Court after deliberate consideration, in the case of *Churnside v. Currie*, 11th July 1789; and the authority of that decision was recognised in *Orme v. Diffors*, 30th November 1833, notwithstanding doubts expressed by Mr. Bell in his Commentaries, and by Mr. Brodie in his Notes on Stair—doubts which were participated in by Lord Moncreiff, as stated in his note in reporting *Orme's* case, where his Lordship points out the discrepancy between this decision and the law as settled in England, where a married woman is not liable unless her husband has been transported. The doctrine established by the cases of *Churnside* and *Orme* must be carefully limited to the circumstances in connexion with which it was introduced, viz., where the wife is seeking support in her husband's absence by carrying on a trade. She cannot grant a valid disposition of heritable property without her husband's consent, even when he is bankrupt and abroad; *Dick v. Donald and Cuthbertson*, 12th December 1826,—reversing the judgment of the Court of Session, which is not reported. In the case of *Buchanan v. Dickie*, 17th June 1828, a married woman in trade was, under very peculiar circumstances, found primarily liable for monies collected by her, her husband being alive and in this country; but the opinions of the Judges shew that the decree was limited so as to exempt the wife from personal diligence.

A married woman may, without her husband's consent, dispose of her separate property, heritable and moveable, by deeds to take effect at her death; and she may also grant a bond to take effect at her death.

The distinction between the deeds which a married woman *can* grant, viz., those affecting her property, and the deeds which she *cannot* grant, viz., such as affect her person, is clearly shewn in *Smith v. Kemp*, 10th January 1828, where a law-agent employed to take a security from a wife, instead of a deed mortgaging her estate, took a personal bond, and was held responsible for the loss occasioned by the deed being void.

M. 6082.

12 S. 149.

ii. 167.

p. 34.

2 Wils. and
Sh. App. 522.

6 S. 986.

4 Mur., Jury
Rep. 400.

It has been decided in *Stoddart v. Rutherford*, 30th June 1812, that a married woman may legally be named, and may act, as a trustee, and *sine quâ non*, there being, in the words of Lord Meadowbank, "no sinking of the rational person by marriage." Her husband F. C. may no doubt object, but, in order to do so effectually, he must prohibit her *in limine*.

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From a regard to the influence which husbands naturally have over their wives, and to the possibility of that influence being exerted in causing them to execute deeds which may be afterwards challenged upon the ground that they were granted not voluntarily, but under the compulsor of force or threats, parties contracting with wives frequently require for their own security a judicial ratification by the wife. She appears before a magistrate in the absence of her husband, (whose presence will nullify the ratification,) and there she solemnly ratifies and approves of the deed, declares that she was not compelled or seduced to grant it, but did so of her own free will; and gives her great oath, that she will never quarrel or impugn it.

JUDICIAL RATI-
FICATION BY
MARRIED
WOMEN.

The Act 1481, cap. 83, shews the ratification in practice at that early period, and the effect given to it in cutting off the power of challenge. It is mentioned by Erskine in his larger work, that in his time the wife's *solemn declaration* was coming into use in ratifications instead of her *oath* according to the previous inveterate usage. In recent practice, however, such ratifications are given upon oath; and the Act 6 & 7 Will. IV., cap. 43,* was passed, in order to exempt judicial ratifications by married women from the operation of the previous statute, 5 & 6 Will. IV., cap. 62, by which declarations had been substituted in place of certain oaths.

Judicial ratification, however, is not necessary to validate the deed of a married woman. The deed is valid of itself, if it be not reduced, and the effect of the ratification is only to secure it from challenge, by excluding the allegation that it was granted through force or fear. Accordingly, the objection to the deed of a married woman, that it had not been judicially ratified, has repeatedly been repelled, where there was no averment that the deed had been granted under the operation of force or fear. It was so in the case already referred to of *Clark v. Gibson*, 24th January 1826; and in *Buchan v. Risk*, 1st 4 S. 388. March 1834, this was one of the grounds upon which it was attempted to reduce a disposition of heritage granted by a married woman in security of her husband's debt, and which disposition she had refused to ratify. It was held, however, that the absence of a ratification was no ground of reduction, unless there were some evidence of the application of force, fear, or undue influence, by the hus-

* The preamble of this Act shews that its purpose was to restore power to justices and others to administer such oaths, and that the effect of ratifications remains the same as formerly according to the law and practice of Scotland.

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Inst. i. 6, 34.

i. pp. 142-3.

M. 16,483.

8 S. 210.

DEEDS BY
DEAF AND
DUMB PERSONS.Educational
Tour, p. 27.See 23d edit. by
Stewart, vol. i.
p. 353.

Inst. iii. 1, 16.

M. 6300.

Inst. i. 7, 48.

iv. 3, 9.

band. But although the ratification affords *primâ facie* evidence excluding the allegation of force or fear, Erskine is of opinion that it ought not absolutely to exclude that allegation, and that the ratification itself should be reduced upon proof, that *it*, as well as the deed, was procured through force or fear. Upon this point diversity of opinion prevails, as you will find on referring to Bell's Commentary. That lawyer holds, upon the authority of *Grant*, 8th July 1642, (a decision impugned by Erskine,) that the wife is for ever cut off from challenge, even although she allege that the ratification was granted through force and fear. Erskine's view, however, is strongly entertained by many Lawyers and Conveyancers; and the ratification of a married woman is not practically regarded, and cannot be held, as an *absolute* security against challenge. The case of *M'Neill v. Steel's Trustees*, 8th December 1829, affords an example of a deed reduced at the instance of a wife, though ratified by her.

It is an interesting mark of the power of a religion of truth, accompanying, while it excites and advances, an active concern for the interests of humanity in its forms of apparent helplessness, that it would now be impossible for an Institutional Writer to classify persons DEAF and DUMB, as falling necessarily within the category of those naturally incapable of contracting. Even where the deprivation of sight has been added to the want of hearing and speech, the enthusiastic efforts of a genuine philanthropy have done much to penetrate into the mind isolated by such barriers, and much also to stimulate and evoke the mental capabilities. An intelligent American writer, Mr. Horace Mann—referring to well-known cases of persons deaf, dumb, and blind, in which a fine intelligence has been discovered and brought into active exercise, notwithstanding the existence of all these obstacles—quotes, as a proof of what education has thus done for mankind, the following passage from Blackstone's Commentaries, which were published in 1765:—"A man who is born deaf, dumb, and blind, is looked upon by the law as in the same state with an idiot; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas." In our own law, Erskine states that the usage of Scotland has disabled all from contracting who have been deaf and dumb from their birth; although the case of *Hamilton*, 9th July 1663, which he cites as authority for that opinion, does not appear necessarily to bear it out; and, both in this passage and in another where the same point is touched upon, Erskine, without stating his own opinion explicitly, indicates that he does not hold the deaf and dumb to be excluded by their infirmity from management of their affairs. In the latter passage reference is made to Stair, where that author certainly appears to take it for granted that the dumb or deaf are to be classed along with others naturally incapable of managing their affairs. In another

passage, however, Lord Stair gives his opinion in these terms:—
 “Those who are deaf or dumb may contract, if they have the use of
 “reason, and if it appear they understood what was done, and ex-
 “pressed their consent by their ordinary knowing signs.” This is
 undoubtedly the correct doctrine, and its justice is made more and
 more clear by the advances of science in teaching this interesting
 class of persons, triumphing in an unexpected degree over difficulties
 apparently insurmountable, and conferring upon those who are thus
 deprived such means and facilities of communication with their fel-
 lows, as have enabled them to give the most satisfactory evidence of
 the possession of reasonable and disposing minds, capable of deliber-
 ating and acting notwithstanding the absence of the faculties which
 have been denied to them. Such of you as may have an opportunity
 of referring to the reports of Justiciary cases, will find deaf and dumb
 persons admitted as witnesses, and their testimony taken by inter-
 preters, in *Martin*, 13th June 1823, and in *Wintrup*, 19th September
 1827.

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 I. 10, 13.

As the assent of the understanding is of the essence of a contract, the power of contracting is necessarily denied to those whose reason is entirely obscured, *e.g.*, IDIOTS and PERSONS INSANE, or who possess the use of reason in only an imperfect degree. The law which has a suitable protection for every one unable to attend to his own rights, provides for these cases of incapacity either by the appointment of guardians in legal form, after the necessity of it has been ascertained by a solemn judicial inquiry called a process of cognition, or by the more summary and convenient form of nomination by the Supreme Court, —the latter being the course usually adopted where no resistance or conflicting right renders it necessary to cognosce. It is not, however, the appointment of guardians either by service in a process of cognition, or by the Act of the Supreme Court, that determines the invalidity of a deed granted by a person, whose reason is either entirely wanting, or in a state of imbecility. The existence of insanity at the date of the deed is an undoubted ground of reduction. This was fixed by the Act 1475, cap. 66, which directed that the Inquest should ascertain the date of the commencement of the insanity, and declares that alienations, made by the person cognosced, after the time at which he is found to have become insane, shall be of no avail, as well as alienations made after the serving of the brieve.

It is impossible to prescribe any fixed rule with respect to that large number of cases in which, although the reason is not entirely obliterated, yet the mind is in an imperfect or impaired condition, whether from natural weakness of intellect, or from imbecility induced by disease or by age. The question will always be in regard to the degree of weakness, and whether the party was, or was not,

INCAPACITY TO
 CONTRACT BY
 REASON OF
 IDIOCY AND
 INSANITY.

DEEDS BY PAR-
 TIES OF IMBE-
 CILE OR FACILE
 MIND.

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1 S. 66.
2 Sh. App. 212.

capable to judge of the import and effect of the deed, and to exercise an independent will in regard to its execution. Cases of this description are best studied and understood in examples: In *Berry v. Anderson*, 13th June 1821, affirmed 26th May 1824, a promissory note and heritable security were reduced in circumstances indicating facility on the part of the granter, who had executed them without requiring any detail of the alleged debt, and while various other parties, who were primarily liable, were not discussed. Although a party is legally capable of contracting, yet, if it shall appear that he was naturally of weak intellect and facile disposition, it will be incumbent upon the holder of the deed to prove that it was fully understood by the granter. From the failure of such proof, a settlement of heritage

1 Sh. App. 472.

was reduced in the case of *White v. Ballantyne*, 20th June 1823, reversing the judgment of the Court of Session, which is not reported;

4 S. 200; and
2 Wil. & Sh.
App. 648.

and to this the subsequent case of *Watson v. Noble's Trustees*, 18th November 1825, affirmed 29th June 1827, is exactly analogous. Here a deed of settlement, executed by a party capable of disposing of her estate, was reduced, upon the ground that, at the time of executing it, she was in a weak and debilitated state of mind, and unable to judge correctly of its effect in depriving herself of all power to alter; and the deed not being her free and voluntary act, although no undue influence had been used to obtain it. This case, you will observe, is instructive: we see a party capable of disposing of her estate, and whose settlement of it would have been sustained if made in a simple form easily intelligible. On the other hand, there was no proof that the party founding on the deed had used undue means to obtain it; and yet it was reduced upon evidence that, at the time of executing the deed, her mind was too weak to comprehend the effect of its provisions. In the case of *M'Neil v. Moir*, 21st May 1824, a transaction with an old man nearly eighty years of age, grossly unequal as regarded his interest, and of which he did not understand the effect, was reduced on the ground of facility; and to the same effect is *M'Diarmid v. M'Diarmid*, 17th May 1826, where the deed of a man upwards of eighty years of age, renouncing a valuable succession without any adequate consideration, was reduced.*

2 Sh. App. 207.

4 S. 583; affd.
3 Wil. & Sh.
App. 37.

effect is *M'Diarmid v. M'Diarmid*, 17th May 1826, where the deed of a man upwards of eighty years of age, renouncing a valuable succession without any adequate consideration, was reduced.*

17 D. 16.

* Reference may also be made to the case of *Olunie v. Stirling*, 14th November 1854. There a transaction—by which a gentleman, who had been brought by attacks of paralysis into such a state of nervous debility as prevented him from taking any serious or deliberate views on matters of business, had purchased an annuity at a disadvantageous price—had been reduced, the jury having found for the pursuer upon the following issue:—"Whether, at the date of the said bond of annuity, the said James Oliphant Clunie was weak and facile in his mind, and easily imposed upon; and whether the defender by himself, or by another or others, taking advantage of the said James Oliphant Clunie's weakness and facility, procured the said transaction through circumvention, to the lesion of the said James Oliphant Clunie?" The defender attempted to set the verdict aside as contrary to evidence, contending that it was necessary to find "some positive fact proved, which amounts in itself to a distinct act or piece of circumvention—some trick—some particular practising

This objection is applicable to all deeds granted under such morbid influences as divest the mind of its capacity to deliberate and to form a sound judgment of that which the party professes to do or say. It has, accordingly, been found a relevant objection to the declaration of a female, that when it was emitted she was suffering from an hysterical attack, and unfit for examination; but the objection failed in the proof; *Elder*, 19th February 1827.

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1 Syme's Just.
Rep. 113;
Shaw's Just.
Rep. 178.

There is no doubt that Intoxication, when of such an extent as to deprive the party for the time of the direction of his reason, renders him incapable of contracting. It is just the same, as remarked by an English Judge, as if the party wrote his name in his sleep in a state of somnambulism. So, in *Jardine v. Elliot*, 9th June 1803, the sale of an entire stock of sheep, at a certain price per head for all that could rise and run and were not diseased, was reduced, although both parties were intoxicated, and there was no proof that the price was much below the value, the transaction being really a drunken freak, and the serious and mature consent suitable to such a transaction not having been interposed. Again, in *Duncan*, 18th July 1839, missives of sale of a land estate were reduced, upon evidence that the purchaser, when he subscribed them, was in a state of imbecility from intoxication. But this is a plea upon which, especially when adduced by the party himself, the evidence must be clear; and it will not be sufficient to annul the deed, that there has been such a degree of excess as to cloud or darken the understanding, if it was not entirely obscured; *Lord Haltoun v. Earl of Northesk*, 29th July 1672. Here it was inferred that the party who sought for reduction on account of his own drunkenness, had been sufficiently collected to know what he was doing, since he had inserted the date and witnesses with his own hand, and made such averments, as to the absence of witnesses and otherwise at the execution, as shewed a recollection of what had occurred.*

INCAPACITY TO
CONTRACT ARISING FROM
INTOXICATION.

Byles on Bills,
p. 46.
Hume, 684.

Macf. Jury Rep.
278.

M. 13,384.

In order to protect parties of a facile or profuse disposition from the effects of their own improvidence, the Law has provided the remedy of INTERDICTION. This is a restraint, imposed either voluntarily or by the sentence of a judge—which is a proceeding, however,

INTERDICTION.

“on the mind of the party at a particular time—some details, in short, as to the acts and practices which the general term *circumvention* includes; and that if one cannot lay one's hand on distinct instances, detected and proved, of particular acts and practices amounting to circumvention, there is no ground for supporting the verdict.” The Court, however, refused to grant a new trial, holding that, where there is evidence of facility and lesion, it is not necessary that anything amounting to actual circumvention should be proved; but it is enough to warrant a verdict upon the above issue, if, in the circumstances of the party granting the deed, there was used persuasion which, acting upon a mind facile and nervously anxious from disease, he was not in a condition to resist.

* In *Johnston v. Clark*, 19th December 1854, 17 D. 228, there will be found the form of issues approved of in the reduction of a deed on the ground of intoxication.

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proper only to the *nobile officium* of the Supreme Court. Where the restraint is voluntarily undertaken, the party executes a deed termed a bond of interdiction, whereby he nominates certain persons to act as interdictors, and engages not to sell or otherwise affect his property without their advice. According to the form usually adopted and given in the Juridical Society's System of Styles, the bond of interdiction applies to the moveable property of the grantor as well as to his heritable estate. But this has long ceased to be the legal effect of interdiction, which affects the heritable estate alone, and the interdicted person retains full power to dispose of his personal property, either for onerous causes, or gratuitously; *Davidson v. Town of Edinburgh*, 22d January 1684. Here a party, who had been interdicted as a simple youth, was found not to need the consent of his interdictors to uplift a sum in a personal bond. At the same time, the heritable estate is so effectually secured against the acts of the interdicted person, when unauthorized by his legal guardians, that his personal obligations, although binding as such, cannot be made the ground of diligence, or of claim in any shape, against his heritable property. The bond or sentence of interdiction must be published and registered; and it has not, like the verdict of a jury in the cognition of an insane person, a retrospective effect, but is ineffectual until registration, which is the legal notice to the lieges, as fixed by the Act 1581, cap. 119.

The consent of the interdictors is not essential to validate the deeds of the interdicted person, as is that of curators to the deeds of a minor who has curators; and the onerous and rational contracts of the interdicted party will be sustained, although granted without the consent of his interdictors; *Stewart v. Hay*, 10th November 1676; *A. v. B.*, 27th February 1672. The purpose of interdiction is to defend the party against the granting of deeds for gratuitous or inadequate considerations. But when there is an adequate and onerous cause, the deed is effectual, though not consented to by the interdictors; and this principle is exhibited in the strongest light by the case of *Kyle v. Kyle*, 14th December 1826, where a deed was sustained, though granted by the interdicted party in favour of one of his interdictors, the consideration of it being onerous and rational. When the interdictors do not consent, however, the party will be reponed upon evidence of lesion. But this remedy is confined to such deeds as he grants without consent of the interdictors, and all deeds which are granted with their consent are as valid and unchallengeable as those of a party labouring under no restraint or incapacity. In cases of enormous lesion through deeds signed by the interdictors, the remedy is by an action against the interdictors to indemnify the party for what he has lost by their improper consent.

The interdicted person may bequeath his moveable estate; and it is laid down by Erskine that he cannot either make or alter a settle-

M. 3095.

M. 7149.

5. S. 128.

Inst. i. 7, 58.

ment of his heritage, either with or without the interdictor's consent; in support of which doctrine he refers to the case of *Tenant v. Spreul*, December 1725. But that was the case of a disposition in favour of the interdictor; and the doctrine does not appear to have any good foundation in reason, or to be supported by authority. On the contrary, in the only reported case which appears to bear upon this point, it is said that the Court were of opinion, that a settlement of heritage is not reducible on the ground of interdiction *per se*, where the interdictors consented, if the granter had such a disposing mind as to be capable of disposing it, had he had no interdictors; and that some thought a destination of succession would have been good without their consent, the interdicted person being only so far restrained as the words of the interdiction go; *Gray v. Smith and Bogle*, 8th November 1751.

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CHAPTER I.
M. 7127.
Elchies v. "Provisions to heirs, &c." No. 14; and 5 Br. Supp. 790; M. 10,803.

From what has been stated it appears that the single duty and responsibility of interdictors is to judge of the reasonableness and propriety of deeds by the interdicted party affecting his heritage. They have no charge or custody of person or estate, and are liable only for their own integrity and judgment, in consenting to deeds which their concurrence renders irrevocable.

The attention of the Supreme Court was directed, in the case of *Sommerville's factor*, 6th February 1836, to the subject of the appointment of persons to take charge of the estates of parties unable to manage their own affairs; and a unanimous opinion was expressed that the power of the Court to appoint such managers, who are called *factors loco tutoris*, rested on consuetudinary law, and had been firmly established under the Act of Sederunt, 13th February 1730, which contains regulations according to which such factors were to conduct their management, and to be held responsible. In cases of appointments of this kind, the Court is in the habit of granting to the factor extraordinary powers upon summary application, where it is shewn that such powers are necessary to prevent serious loss, or expedient in order to procure evident and positive advantage; or where the interest of third parties connected with the estate, as, for example, in the relation of superior and vassal, requires that extraordinary powers should be granted. The Act of Sederunt of 1730, now referred to, was very important, as regulating minutely the responsibilities and management of *factors loco tutoris*. It is now practically superseded, however, by the Act 12 & 13 Vict. cap. 51, "For the better Protection of the Property of Pupils, Absent Persons, and Persons under Mental Incapacity in Scotland." This statute contains the rules by which the conduct and proceedings of judicial guardians must be regulated.

FACTORS *loco tutoris*.
14 S. 451.

As a general rule, the Court will not appoint a female to the office

PART I. of *curatrix bonis* or *factrix loco tutoris*, even to her own children ;
CHAPTER I. *Galloway*, 1st February 1855.

17 D. 321. Doubts formerly existed with regard to the authority of the Court,
Curator bonis. in the nominations before referred to in cases of imbecility or incapacity, whereby the charge of a party's affairs is given to another by summary process. This authority was supported, and the competency of such nominations firmly established, by a series of decisions, to which, however, it is no longer necessary to refer, inasmuch as such appointments are expressly recognised by the statute just quoted.

INCAPACITY OF There were formerly considerable limitations to the capability of
ALIENS. foreigners to take by succession property in this country, and to possess feudal subjects in Scotland. It is unnecessary now to dwell upon these, however, an ample remedy for this incapacity being provided by the Act 7 & 8 Vict. cap. 66, which declares every alien born of a British mother capable of taking real or personal estate. And by observing certain forms prescribed in this statute, aliens may obtain certificates from the Secretary of State, which will confer upon them generally the rights and capacities of natural-born British subjects.*

INCAPACITY BY It is proper to advert to the subject of forfeiture by attainder for
REASON OF high treason, whereby the convicted party forfeits to the Crown his
ATTAINER. heritable estate, both fee-simple and entailed, and also his moveable effects. This forfeiture formerly extended without qualification to the heirs of the attainted person ; but by the Act 7 Anne, c. 21, § 10, it was provided that attainder should not disinherit or hurt the right of any one but the offender himself. An attainted person cannot plead his incapacity to contract in bar of his own obligations ;
M. 10,449. *Serra v. Earl of Carnwath*, 24th December 1725.

INCAPACITY OF Another incapacity, very apt to be overlooked in the pressure of
A MERCANTILE business, is that of a mercantile company or firm to hold heritable
COMPANY TO property. This is inconsistent with the nature of the feudal tenure ;
HOLD HERI- and every title to heritage taken in the name of a company, and by
TAG E. consequence every grant made by a company, is inept. The practical mode of obviating the inconvenience resulting from this rule, is to take the title in the name of trustees for the company or firm.

* The previous Acts relaxing the strictness of the law in regard to aliens, were 7 Anne, cap. 5, explained by 4 Geo. II., cap. 21, which latter statute enacted, that children born out of the allegiance of the Crown of Great Britain, whose fathers were natural-born subjects of Britain at the time of the birth of such children, should be held to be natural-born subjects. By 13 Geo. III., cap. 21, the same privileges were communicated to the children of fathers who, in virtue of the former statute, were to be deemed natural-born subjects, though their mothers were aliens. On this subject reference may be made to the case of *Shedden v. Patrick*, 11th March 1852, affirmed on appeal, where it was held that the children of natural-born subjects, who, under 4 Geo. II., cap. 21, are to be considered natural-born subjects of this kingdom, must have been legitimate *from their birth*, and not merely legitimated by the subsequent marriage of their parents ; for to be within that Act, the child must be born to a British father, while a bastard is *filius nullius*.

14 D. p. 721.
1 Macq. App.
p. 535.

Until recently, bastards or natural children were incapable of making wills ; but by the Stat. 6 & 7 Will. IV., cap. 22, such persons were, on the grounds of justice, humanity, and expediency, empowered to dispose of their moveable estate by testament or last will, like other persons.

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INCAPACITY OF
BASTARDS.

In deeds taken to or granted by corporations, or trustees for societies, it is essential that they be conformable to the charter or other constitution as regards the competency of holding the subject, and the mode of vesting and disposing of it.

2. *Subject-matter of Deeds.*—Having thus ascertained the description of persons to whom the law has denied the capacity of contracting, or has given it under certain precautions and safeguards, we are in a situation to determine whether a party is, or is not, qualified to be the grantor or grantee in a deed ; and we shall now proceed to inquire what there may be in the subject-matter of the contract to deprive it of legal force. Every obligation, duly contracted by parties possessing powers to contract, is binding, provided the subject-matter of it be such as may legally be contracted about. But there are things with which the law does not permit parties to deal as the subject of obligations ; and, consequently, it denies all legal effect to deeds granted or received in relation to such matters.

DEEDS BY OR
TO CORPORATIONS.

It is self-evident that no valid obligation can be undertaken or granted, to do that which is in itself naturally impossible ; and by an extension of this principle—things being held to be out of our power, which reason or law forbids—no one can validly contract to do that which is immoral or unlawful. It is to be held as settled, therefore, that no deed granted for a cause which is *contra bonos mores*, will be sustained. Thus a bond granted as the price of prostitution will not receive legal effect ; *Hamilton v. De Gares*, 26th June 1765. This case shews that the principle is not to be extended to all the consequences of the *turpis causa*, on account of which the deed subject to reduction has been granted ; for there were here two bonds, one to a woman who had lived in adultery with the grantor, and the other to her daughter, the fruit of their intercourse ; and it was found, that although no action could lie upon the bond granted to the mother, that given to the daughter was not liable to objection, since it was not only not unlawful that the grantor should provide for his own child, but he was under a moral obligation to do so. In the case of *Hamilton v. Main*, 3d June 1823, a promissory note for £60, admittedly granted in part as the price of prostitution, was held to labour under *vitium reale*, and to be therefore incapable of forming a ground of diligence for the recovery of the remainder of the amount, alleged to be compensation for board and lodgings. Right to raise an ordinary action for such balance was, however, reserved. And in

SUBJECT-MATTER OF DEED
MUST NOT BE
contra bonos mores.

M. 9471.

2 S. 356.

PART I.

CHAPTER I.

14 S. 106.

F. C.

Johnston v. M'Kenzie's Executors, 4th December 1835, it was held a relevant ground of challenge of a legacy to a female, that it had been bequeathed in implement of an illegal agreement, as the consideration of her entering into or continuing criminal intercourse with the testator. In these cases, it is to be observed, that the Court refused to interfere to give effect to an obligation undertaken *ob turpem causam*. But where the party who has obtained such an obligation has succeeded in procuring performance of it, the Court will not order restitution. This distinction was taken in the case of *A. v. B.*, 26th May 1816. There a party had granted certain advantageous leases to his factor for behoof of B. and her daughter. Possession had been held under this arrangement for a period of fifteen years, when the party's heir brought a reduction on the ground that the leases had been granted *ob turpem causam*. But reduction was refused, the Court recognising the distinction between such an obligation, where action is brought to compel implement thereof, and its situation where the action is brought to be restored against implement which has already taken place.*

*Pactum super
hæreditate
vivæntis* NOT
ILLEGAL.

By the Roman Law, the *pactum super hæreditate vivæntis*, that is, a bargain about a right or property dependent upon the life of another, was accounted *contra bonos mores*, upon the principle, no doubt, of discountenancing traffic in matters which confer upon the purchaser a direct interest in the death of another. The Law of England, although it does not entirely repudiate such transactions, regards them with a jealous eye, and gives the same benefit of restitution to the seller as is given by the Law of Scotland to the improvident acts of a minor. The doctrine of the English Law is thus expressed by Lord Thurlow:—"Although the owners of reversionary interests may competently dispose of them, yet, there is a policy in justice protecting the person who has the expectancy, and reducing him to the situation of an infant against the effects of his own conduct." . . . "The heir of a family, dealing for an expectancy in that family, shall be distinguished from ordinary cases, and an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed." There is no such doctrine, however, in the Law of Scotland, which has not adopted the maxim of the Civil Law, and sales of reversionary interests, dependent upon the death of living persons, have long been sustained by our Courts; *Aikenhead v. Bothwell*, 6th July 1630. In that case it was found not unlawful for a party to sell to his brother all the gear that his

M. 9491.

* The price of prostitution is, however, to be distinguished from a compensation for injury already inflicted; as, where a bond of annuity has been granted as a voluntary compensation for injury done by a past illicit connexion, and as an inducement to separate instead of an inducement to continue the cohabitation. See *Bell's Princ.* § 37, and note thereto; and *Illustrations*, pp. 60, 61.

wife should inherit by her father's death. In *Ragg v. Brown*, 15th July 1708, a disposition by an heir, conveying his hope of succession during the life of the nearest heir, was objected to, on the ground of the Roman Law, as inducing *votum captandæ mortis alienæ*, but was sustained by the Court; and the like judgment was given in the recent case of *M'Kirdy v. Anstruther*, 31st May 1839. Here the purchaser had purchased from Sir Windham Carmichael Anstruther his contingent reversionary life-interest as heir of entail to certain lands. At the date of the purchase Sir John Carmichael Anstruther, an infant, was alive, and in possession of the estate. The price was £572, and the rental of the lands £600 *per annum*. Sir John having died at the age of thirteen, Sir Windham succeeded him as heir of entail, and instituted an action of reduction of the sale to M'Kirdy, upon the ground that he had been in great pecuniary difficulties at the time, and that the price was grossly inadequate. There being no facility or circumvention affecting the bargain, the Court found that it could not be set aside. Not only has the Court thus supported deeds giving effect to the sale of reversionary interests dependent upon lives, but it has in repeated instances authorized such transactions to be gone into by the guardians of parties who had great expectations, but were in the meantime in necessitous circumstances. The possession of such a legal resource is evidently of very great moment to parties so circumstanced, as it furnishes a means of providing for the education, and in some instances even for the subsistence, of those whose eventual wealth is in the widest contrast to their present necessities. You will find examples of such transactions being authorized, in *M'Gruther*, 17th February 1835; in *Miller*, 26th November 1836; and also in *Earl of Buchan*, 16th December 1837. These were all cases of pupils, heirs-presumptive to entailed estates of £800, £2000, and £6000 *per annum* respectively; but all, at the date of the application to the Court, destitute of the means of subsistence and education. It will be seen from the Reports, that their guardians were authorized to insure their lives, and to negotiate loans by way of an immediate advance of money, or by an annuity during the pupil's life, and until the succession should open, and to grant security for such loans over the rents of the entailed estates, which should accrue after the pupil's succession. Nor is the practice of selling or impledging reversionary rights limited to cases of that description. Such rights form the subject of daily and familiar practice to the conveyancer.

The loss or gain of money by wager, rewards bargained for as the price of negotiating a marriage, and other stipulations connected with play or jest, fall under the title of *sponsiones ludicræ*, and will receive no effect from Courts of Law, which were instituted to enforce and protect rights arising out of serious transactions, and will leave such

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CHAPTER I.
M. 9492.

D. 855.

13 S. 569.
15 S. 147.
16 S. 239.

OBLIGATIONS
ARISING OUT OF
WAGERS, AND
MARRIAGE
BROCADE
BONDS, CANNOT
BE ENFORCED
AT LAW.

PART I.

CHAPTER I.

M. 9523.

M. voce, *Pactum Illicitum*, App. No. 8.

10 Dunlop, 646.

DEBTS ARISING
OUT OF GAMING
OR BETTING
FORM AN ILLE-
GAL CONSIDERA-
TION FOR AN
OBLIGATION.

6 S. 818.

disputes to be adjusted upon the maxim, *melior est conditio possidentis*. In *Bruce v. Ross*, 26th January 1787, the Court refused to sustain an action for £50, alleged to have been won by a wager respecting the election of a Member of Parliament, and the judgment was affirmed on appeal. And in *Gordon v. Campbell*, 17th November 1804, the Court dismissed an action founded upon a formal obligation to pay a certain sum of money in the event of Government Stock attaining a certain price. The Statute 7 Geo. II. cap. 8, is not referred to in the report of this case; but it annuls all wagers and contracts in the nature of wagers, relating to the price of the public securities. The objection of *sponsio ludicra* was taken in *Graham v. Pollok*, 5th February 1848, which was a competition in a multiplepointing for a picture won at a coursing match; but the Court held that objection not to apply to the determination of a patrimonial right dependent on the question, which of the two claimants had that interest in the winning dog which entitled him to the prize, although they would not have entertained a question as to which dog had won. It was admitted that a particular dog was the winner; and the question was, whether A., who said, "I gave B. a mandate to run my dog for me," or B., who said, "I borrowed the dog to run for myself," was entitled to the prize. This was a question not of racing, but of mandate or loan.

The Act 9 Anne, cap. 14, declares, that all notes, bills, bonds, mortgages, securities, or conveyances, where the whole or any part of the consideration shall be for what is won by gaming, or cards, or by betting at games, shall be deemed fraudulent and void, and of none effect to all intents and purposes whatever. There is an example of the application of this statute in *Ferrier v. Graham's Trustees*, 16th May 1828, where two bonds for £2000 each, granted for a gambling debt, were found null. It is also fixed by this case, that where such bonds are made over to an assignee in good faith, there is an implied warrandice that a debt exists (*debitum subesse*), upon which action will be maintained at the instance of the assignee against the cedent for restitution of the price paid.

By the Scots Act 1621, cap. 14, it is enacted, that if one shall win more than 100 merks (£5, 11s. 1d.) at cards or dice within twenty-four hours, or shall gain more than 100 merks by wagers upon horse-races, the surplus shall be forfeited to the Kirk-treasurer in Edinburgh, or the Kirk-Session in the country, for the benefit of the poor of the parish where it was won. This statute was held to be in force in *Maxwell v. Blair*, 14th July 1774; and the forfeited money was found to belong to the parish where the bet was laid, in *Kirk-Session of Dumfries v. Kirk-Sessions of Kirkcudbright and Kelton*, 15th June 1775.

Where the objection under the statute of Anne applies to a ground of debt, it was held, in consequence of the nullity imposed by that act, to import a *vitium reale*, which deprived the document of all

M. 9522.

M. 10380.

effect even in the hands of third parties ignorant of the circumstances under which it was granted. So action was refused upon a bill for £200, accepted in payment of a gambling debt, although it was in the hands of an onerous *bond fide* holder, not cognizant of the circumstances under which it had been granted; *Hamilton v. Russel*, 18th May 1832. But the hardship thus imposed upon innocent parties was removed by 5 & 6 Will. IV. cap. 41, which repeals the nullity attached to such grounds of debt, and enacts that they shall only be deemed as granted for an illegal consideration, reserving recourse to the party who pays against the original receiver of the security.

The present Bankrupt Act, 2 & 3 Vict. cap. 41, affords an example of *vitium reale* in its 124th section, whereby securities granted to facilitate a bankrupt's discharge are declared null and void.

Another example of *vitium reale* will be found on referring to the statute 20 Geo. II. cap. 40, which denies action for supplies of spirituous liquors of smaller value than 20s. This is held to vitiate a ground of debt for such furnishings so entirely, that action cannot be maintained even for an amount legally contracted, if contained in the same document; *Maitland v. Rattray*, 14th November 1848.

It is unnecessary any longer to refer to the statutes for repressing Usury, these having all been repealed by 17 & 18 Vict. cap. 90. It is now, therefore, lawful to exact any rate of interest upon which parties may agree. But it is important to observe that this statute does not continue the provision of 2 & 3 Vict. cap. 37, whereby any higher claim than five per cent. was excluded, when the parties had not agreed upon a different rate. It would now appear to be advisable, if not necessary, to make the rate of interest matter of special contract in every transaction. This statute leaves untouched the law as to pawnbrokers.

By the Act 1594, cap. 216, the Lords of Session, advocates, clerks, writers, their servants, or other members of the College of Justice, or inferior judgments within the realm, their deputies, clerks, or advocates, are prohibited to purchase, directly or indirectly, lands or other property dependent in controversy, under penalty of deprivation of office. It has been found in more than one case that this statute is penal only, and does not annul the rights against which it is directed; *Purves v. Keith*, 20th December 1683; *Home v. Earl of Home*, 15th December 1713. It is necessary, also, in order to bring the transaction within the operation of the statute, that there shall be, at the date of the purchase, an action in dependence in relation to the right acquired; and, although the purchase of property under litigation is thus prohibited, that has not been held to affect the validity of a conveyance of the subject of the suit to the agent conducting it, where the conveyance was not absolute, but in security of sums laid out for the party's aliment and in carrying on her plea; *Forbes v.*

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10 S. 549.

SECURITIES TO
FACILITATE A
BANKRUPT'S
DISCHARGE ARE
NULL.

DOCUMENTS OF
DEBT NULL
UNDER THE
TIPLING ACT.

11 D. 71.

USURY.

BUYING OF
PLEAS IN-
VOLVES A PEN-
ALTY, BUT DOES
NOT ANNUL THE
RIGHT.

M. 9500.
M. 9502.

PART I.

CHAPTER I.

5 Br. Supp. 630.

Bean, 30th July 1774. It may be regarded as a favourable indication generally of the state of feeling and principle in the legal profession, that few cases of this description have occurred; and as the statute does not annul the transaction, but imposes the penalty of professional deprivation, it may perhaps be inferred that the sanction of the act has not been the less operative that it has been directed against a party's status rather than his gain. It is unnecessary to say a word in dissuasion of transactions, to which it would be impossible to give the slightest countenance without opening the door to great fraud and abuse, and converting the members of an honourable profession into selfish speculators in the rights of the clients whose interests it is their duty to protect.

*Pactum de
quotâ litis*
ILLEGAL.

9 S. 364.

Of a similar character is the *pactum de quotâ litis*, a bargain by which the legal adviser is to participate in the profitable issue of the suit. This species of transaction does not fall under the Statute 1594 just referred to, but it is prohibited by the Common Law; *Johnston v. Rome*, 1st February 1831. Here the Court refused to give effect to an agreement by which a Law-agent engaged to act gratuitously if unsuccessful, but stipulated, in the event of success, for one-half of the land to be vindicated. At the same time the Court reserved his claim to a suitable remuneration for his trouble. The case of *Bolden v. Fogo*, 27th February 1850, affords an example of the *pactum de quotâ litis*. An English solicitor, for a large pecuniary consideration in the event of success, agreed to conduct a litigation at his own expense. The result being adverse, he sued for his business-account; and when the agreement was produced, as barring his claim for expenses, he pleaded that it was illegal. But the Court held that, as the professional services and outlay contained in the account arose under the agreement alone, the pursuer could not claim payment on the footing of regular professional employment inconsistent with that agreement. The Court were also of opinion that a party, having entered into and acted upon an illegal contract, is not entitled, for his own benefit, to plead its illegality.*

GIFTS FROM
CLIENT TO
AGENT.

18 Vesey. 301.

18 Vesey. 120.

1 Cox, 112.

* It is an established rule of English Law, "that an attorney shall not take from his client a gift or reward while standing in that relation, the connexion between them subsisting with the influence attending it, though the transaction may be as righteous as ever was carried on; that the connexion must, as in the instance of guardian and ward, be *bonâ fide* dissolved, before the agent can take anything beyond his regular fees;" *per* Lord ELDON in *Montesquieu v. Sandys*, 11th November 1811. The same judge states the rule as resting upon this great principle, viz., "The danger from the influence of attorneys or counsel over clients, while having the care of their property; and whatever mischief may arise in particular cases, the law, with the view of preventing further mischief, says they shall take no benefit derived under such circumstances;" *Wood v. Downes*, 2d July 1811. Lord TRAULOW, in *Mills v. Middleton*, 15th July 1784, remarks:—"In the case of attorneys, it is perfectly well known that an attorney cannot take a gift while the client is in his hands, nor instead of his bill. And there would be no bounds to the crushing influence of the power of an attorney, who has the affairs of a man in his hands, if it was not so. But once

Upon the same principles, which gave rise to the act against the purchase of suits, and to the law of usage against the *pactum de quotā litis*, contracts are voidable which create extraordinary interests in the profits of litigation. Every agent has necessarily an interest in the profits of the business which he conducts. The risk of abuse from this source has its preventive in the character of professional men—in their intelligent perception that their reputation, as well as the security and success of their practice, depends infinitely more upon their acting well as disinterested advisers, than as agents of litigation. The law, therefore, discountenances all arrangements of which the effect is inconsistent with that salutary state of feelings and relations; and, accordingly, contracts for securing the profits of legal proceedings to parties who do not conduct them will be annulled. Thus, in *Brasie v. M'Kinnon*, 9th March 1820, it was found illegal for an agent before the Supreme Court to receive the fees of pleadings for his clients in the inferior Courts drawn by himself under an arrangement with a solicitor in the inferior Courts,—the opinion of the Judges being, that it was improper for an agent in the Court of Session to make profit of the proceedings before an inferior Court; and that it was improper for a solicitor before an inferior Court to enter into an arrangement by which papers to be given into Court by him were to be drawn by others, though he was bound to certify that they were drawn by himself. And in *A. B. v. C. D.*, 12th May 1832, a writer in Glasgow, having made pecuniary advances to enable a party to become an agent in the Supreme Court, and to make disbursements in conducting business, and having stipulated for a share of the profits of the Edinburgh business, and that the agreement should be kept secret, the Court refused to sustain an action upon the contract, the Lord Justice-Clerk (BOYLE) remarking:—"One important part of the duty of an agent frequently is to advise his client not to go on with an action; but, if a compact is entered into of the nature of that before us, the agents become so inte-

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CHAPTER I.
CONTRACTS
WHICH CREATE
EXTRAORDINARY
INTERESTS
IN PROFITS OF
LITIGATION ARE
pacta illicita.

F. C.

10 S. 523.

"extricate him, and it may be otherwise." See also *Tomson v. Judge*, 25th June 1855. In 19 Eng. Jurist, Scotland, the point was lately raised in the case of *Sir Windham Carmichael Anstruther v. 583*. *Wilkie*, 31st January 1856. In that case, Anstruther, while his accounts were yet unsettled, entered into an agreement with his agent, whereby he agreed to assign various policies of insurance in favour of the latter in security of a sum of £7000, consisting of £3700, being the amount of his business-accounts, £2300, being an advance of cash, and £1000, of which sum the said Sir W. C. Anstruther agrees to make a gift to the said J. F. Wilkie, as a reward for the extra trouble which he has had with the business of the said Sir W. C. Anstruther, as well as for the zealous manner in which he has conducted the same; and which sum is over and above and exclusive of the said business-accounts." Anstruther having brought a reduction of this agreement in so far as it related to the gift of £1000, the Court reduced it, as not binding on the pursuer in the circumstances of the case. But a strong opinion was expressed from the Bench, that such an obligation by a client in favour of his agent, while accounts between them are unsettled, is, by the Law of Scotland, *ipso jure* null, irrespective of the circumstances in which it may be granted.

PART I. "rested in the profits of litigation, that the interests of the client
CHAPTER I. "would most indubitably be set at nought."

A PERSON IN A
POSITION OF
TRUST CANNOT
BE CUCTOR IN
REM SUAM.

PURCHASE OF
TRUST PROPER-
TY BY TRUSTEE.

M. 13,367, and
3 Paton's App.
378; Ross's
Leading Cases.
F. C.

15 D. 845.

2 Shaw App. 1.

8 D. 400.

1 M'Queen's
App. 461.

We may notice here the disqualification affecting persons occupying offices of trust, which excludes them from acquiring a personal interest in the subject of the trust. This principle applies generally to every trustee or officer holding a position of trust. Thus the common agent in a process of ranking and sale is disqualified from purchasing the estate; *York Buildings Co. v. Mackenzie*, 8th March 1793, as reversed on appeal, 13th May 1795. The commissioner upon a bankrupt estate may not purchase the sequestered property; *Mac-kellar v. Balmain*, 8th March 1817. And the rule extends to all whose position imposes upon them a duty on behalf of the vendor, with which it is inconsistent that they should acquire an interest as purchasers;* see the case of *Thorburn v. Martin, &c.*, 8th July 1853. There debts due to a bank, having been purchased by one of the directors appointed to superintend the sale of the outstanding debts, and who was also law-agent of the bank, the sale was reduced. But the rule is not pushed so far as to exclude from purchasing all who have been concerned with the business, provided their connexion has not been of an intimate nature. Accordingly, the signing of formal petitions relative to a sale was found not to incapacitate the subscribing counsel from becoming purchaser; *Wemyss v. Montgomery*, 25th February 1824. It is also to be observed that this disqualification does not impart the character of nullity to the transaction. It gives an equitable right of challenge to the party interested to challenge. So the purchase by a trustee is not absolutely void; it is only voidable. From this it follows that third parties,

* The rule laid down in the text is thus expressed in the Roman Law:—"Tutor rem pupilli emere non potest; idemque porrigendum est ad similia, id est, ad curatores, pro-
"curatores, et qui negotia aliena gerunt." It is further illustrated by the cases of *Taylor v. Watson*, 20th January 1846, and *Aberdeen Railway Company v. Blaikie*, 20th July 1854. In the former case it was laid down, that a creditor, holding a bond and disposition in security, with a power of sale, is in a situation analogous to that of a trustee. In the exercise of the power of sale, he acts not for his own benefit only, but for behoof of all concerned—of the other creditors, where there are any, and of the debtor himself, who has the resulting interest. The Court, therefore, held that, being a trustee, he could not legally purchase the property over which he had the power of sale. In the latter case, the House of Lords decided that a contract for furnishing iron railway chairs, entered into between the Railway Company and one of their directors, was void, and could not be enforced against the company. It was laid down, as a rule of universal application, that trustees cannot enter into contracts in which their own interests conflict with those of their constituents; that this principle is so strict, that no investigation can be allowed into the fairness or unfairness of the transaction—*Blaikie* was bound to make the best possible bargain for the company; while his personal interest as a member of the firm contracting with the company, would lead him in an entirely opposite direction; that directors have duties to discharge which are of a fiduciary nature; and any contract in which a director is interested, entered into with the company, must, therefore, be void; and that it makes no difference whether the case is that of a sole trustee, or manager, or one of a body of directors.

deriving right from the person liable to the objection, are not affected, if not cognisant of it; and he who might challenge the right is barred from doing so, if by his conduct he shall approve and homologate the transaction. These points are all illustrated by *Fraser v. Hankey & Co.*, 13th January 1847. But, although the purchase of an estate by a trustee was here sustained, on account of distinct and long-continued acts of homologation by the party interested to challenge it, the very circumstance that such a challenge was brought thirty-nine years after the date of the purchase, affords a strong argument to professional men to discourage such transactions alike by their advice and their example.

PART I.
CHAPTER I.

9 D. 415.

An example of the incompetency of a contract opposed to Statutory Law, is afforded by the invalidity of an agreement by a tollkeeper to accept of less than the full toll, such arrangements being declared unlawful by the General Turnpike Act; *Balfour v. Sharp*, 26th June 1833. And all deeds in relation to transactions for evading the customs' and excise duties are null. Therefore, in *Cantley v. Robertson*, 11th February 1790, the Court refused to sustain a suit at the instance of a British subject, living in Rotterdam, for the price of smuggled goods; and in *Nisbet's Creditors v. Robertson*, January 1791, an heritable bond, which had been granted for the price of smuggled goods, was reduced after having been assigned to a third party. Other cases are given in the Dictionary under the head *PACTUM ILLICITUM*, section 13.

DEEDS INVALID
UNDER TURN-
PIKE ACT;
AND CUSTOMS
AND EXCISE
ACTS.
11 S. 784.
M. 9550.

M. 9554.

Another class of cases falling under this head, is the very important one relating to the appointments and remuneration of Public Officers. These are servants engaged on behalf of the public to perform certain duties, and having a provision made for their support and remuneration in the discharge of such duties, either from the public purse, or from some other defined source rendered available by public authority. As the efficient discharge of the duties of such officers is necessarily dependent upon their enjoyment of the means of living provided as their official remuneration, the public exigency requires that their salaries shall not be diverted to other purposes; and that the appointment of such officers shall not in any respect be made subservient to the promotion of private interests, which may interfere or conflict with the proper discharge of the public function. In conformity with this general principle, it has been found incompetent for the Heritors and Minister, in electing a Parochial Schoolmaster, to stipulate that he shall hold the office during their pleasure, because a Parochial Schoolmaster is by law a public officer, and holds his office *ad vitam aut culpam*; *Duff v. Grant*, 20th February 1799. This applies, however, only to Parochial Schoolmasters; and there is no such presumption of permanency in the appointment of other teachers. Again, certain periods having been fixed by law, at which

Pactum illicitum ARISING IN THE CASE OF PARTY HOLDING A PUBLIC OFFICE.

SCHOOLMASTER.

M. 9576.

- PART I.
CHAPTER I.
MINISTER.
M. 15,710.
- the stipends of Ministers may be augmented, the Courts will not recognise private agreements controlling the effect of the statutes; and, therefore, an agreement not to apply for an augmentation during an incumbency was held not to be binding; *Earl of Kellie and others*, 9th March 1803. Upon the principle just stated, and upon the authority of the case of *Paul*, to be presently referred to, it may now be regarded by the Conveyancer as in the highest degree questionable, whether a public officer can assign or impledge his salary. The condition of the law upon this point has never been satisfactorily ascertained, although there are both *dicta* and decisions, from which the invalidity of such conveyances is plainly deducible. It is stated by Erskine, that offices of trust, conferred during pleasure or for life, upon personal regard, cannot be appraised or adjudged; and that the Kings' pensions are not arrestable, because they are alimentary; and, indeed, that all salaries annexed to offices, in so far as they amount to no more than a reasonable allowance for the decent support of those who are named to them, though they be granted by subjects, ought, upon the same ground, to be accounted alimentary.
- Inst. ii. 12, 7.
- Inst. iii. 6, 7.
- M. 165.
KEEPER OF
REGISTER OF
SABINES.
- In the case of *Wilson v. Falconer*, 7th December 1759, it was found incompetent to adjudge the office of Keeper of the register of sasines, although Lord KAMES in very confident terms challenges the decision, and draws a distinction between offices in which there is a power of deputation, of which he conceives the emoluments to be subject to adjudication, and offices where there is no power of deputation, as in the case of the Supreme Judges, which he holds not adjudgeable. In the case of *Thomson v. Dove*, 16th February 1811, we find an excerpt from the Lord Chancellor's speech in deciding the earlier case of *Anstruther v. Miller*, 25th February 1802. The question in *Anstruther's* case was the legality of the sale of the office of Clerk of the bills, and the sale was condemned upon principles which clearly strike at every transaction tending to curtail a public officer's legal provisions. In the case of *Thomson*, certain members of the Town Council of Edinburgh, in electing a joint-keeper of the Parliament-House, imposed upon him an obligation to pay an annuity to another candidate, and this was found to be *pactum illicitum*, Lord-President BLAIR pointing out the evils which would result, were such a practice permitted in the case of a body exercising patronage so extensive as is enjoyed by the Corporation of this city; and in the case of *Gardner v. Grant*, 11th March 1835, an agreement by a Macer of the Court of Session, that he should, besides an annual payment in use to be made to the patron of the office, pay also an annuity to the person who procured the appointment for him, was found null, some of the judges holding it to be *pactum illicitum*, and others conceiving that an inadequate allowance was left to the Macer to secure the discharge of his duties. In the sequel of that case,
- F. C.
- 13 S. 664.
MACER OF
COURT.

Bruce v. Grant, 27th February 1839, it was found incompetent for the patron to reduce the presentation to the macership, upon the ground of non-implement of the illegal stipulation. But, notwithstanding these decisions, it was not held to be settled law, that a public officer might not assign the emoluments of his office, and such assignments did actually occur; while the Court of Session was also in the constant practice, in processes of *cessio bonorum* at the instance of public officers, to require the allocation of a portion of their emoluments as a fund for the payment of their creditors. In the case of *Scott*, 25th January 1817, reported under date 11th March 1818, a minister, having obtained the benefit of *cessio*, was ordained to assign to his creditors £75 a-year of his stipend, which amounted in all to £150; and this was affirmed on appeal, 5th March 1823. Very important observations, however, fell from the Lord Chancellor, when the case of *Paul v. Hill*, 15th November 1838, was considered upon appeal in the House of Lords. In that case, in apparent inconsistency with the case of *Wilson*, it had been held by the Court of Session, that the emoluments of the office of the Keeper of a register of sasines were carried by a general clause in a trust-deed of the party conveying his whole effects for behoof of creditors. But the House of Lords reversed the decision; and, although this was done upon the principle that such a general clause could not be held to include the future fees of a public officer, the Lord Chancellor made very pointed remarks, impugning the competency of assigning the future emoluments of the office in question. He pointed out that such an assignment would be illegal and void in England upon principles of public policy, which principles, he observed, were also, upon the authority of Erskine, to be found in the law of Scotland; and his Lordship expressed a hope that his observations would secure attention to the point, if it should afterwards arise for decision. In this state of the law, therefore, a Conveyancer could not, without incurring the hazard of personal responsibility, advise the assignment of the emoluments of a public office as a competent security which the law would sanction.

In consistency with the principle already illustrated, effect has been refused to an agreement between two public officers, whereby one of them undertook to discharge the duties of both; *Mason v. Wilson*, 28th November 1844. In the case of *Henderson v. Mackay*, 20th December 1832, the Court refused action upon a contract between a law-agent and a Messenger-at-arms, whereby the messenger engaged to exercise his functions for a salary under the agent, who was to receive the fees, such an agreement being held inconsistent with the *status* of a messenger-at-arms as a public officer.

Other instances of *pactum illicitum*, to which the law will give no countenance, are cases of bribery; and so a bond for an annuity,

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1 D. 583.

F. C. (foot-note.)

1 Sh. App. 363.

1 D. 27.

2 Rob. App. 524.

MESSANGER-AT-ARMS.

7 D. 160.

11 S. 225.

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A BRIBE IS AN
ILLEGAL CON-
SIDERATION.
1 S. 234.

SIMONICAL
PACTIONS ILLE-
GAL.
M. 9580.

IMPOSSIBLE
CONDITIONS.
Ersk. Inst. iii.
8, 85.

EFFECT OF CON-
DITIONS IN RE-
STRICTION OF
MARRIAGE.

i. 3, 7.

iii. 3, 85.

M. 2964.

M. 2965.

given as a consideration for securing a vote for a Member of Parliament, was held void, in *Glen v. Dundas*, 15th January 1822. Nor will support be given to simoniacal pactions, by which the office of the holy ministry is given in consideration, wholly or in part, of secular stipulations. The Court, therefore, refused to sustain an action upon an obligation for an annuity of £20, granted by the presentee's father as a part consideration for a presentation to a living; *Maxwell v. Earl of Galloway*, 19th January 1775.

If a deed is dependent upon a condition impossible of fulfilment, it is null, except in testaments and legacies, and even in deeds *inter vivos*, when the granter lies under a natural tie to execute them. In these excepted cases, the condition will be held *pro non scripto*, and the deed will receive the same effect as if it had been granted without the insertion of such a stipulation.

There is one species of condition which has been viewed with considerable diversity of opinion at different periods—stipulations, viz., whereby legacies or provisions are granted upon condition that the grantee shall not marry a particular person, or shall marry only with the consent of persons named by the granter. The opinion of Lord Stair is, that when parents give bonds to children on such a condition, the “bonds are valid, and the condition is void, as against the “freedom of marriage, which the natural affection of parents obliges “them not to violate. But if such a condition be imposed by any “other, who hath no natural obligation, the condition is valid.” Erskine, again, states the law in conformity with the course of decisions at the period when he wrote, whereby no greater force was allowed to conditions of this sort than to the Judge appeared proper; and even in the case of provisions, made (with the condition referred to) by strangers under no natural obligation, the ancient practice of strict adherence to such condition had been departed from in Erskine's time, and the effect given to the stipulation, in this case, also, was dependent upon the Judge's opinion whether or not consent to the marriage was withheld upon reasonable grounds. In illustration of the opinions now cited reference may be made to the following cases; *Hume v. her Tenants*, 16th December 1629. Here a tack was declared null, if the tenant's daughter should marry without the landlord's consent; and, although he lived some years after her marriage without expressing disapproval thereof, the tack was annulled in the absence of his express consent. This case affords, no doubt, a picture of relations which subsisted under feudal usages, but which have now entirely disappeared, and it may justly be doubted whether any effect would now be given to a stipulation of this kind in such circumstances. In *Gordon v. The Laird of Leyes*, 8th January 1663, a bond to a daughter, under the condition that she should marry with the consent of a person specified, was held good although she married without the

required consent, and the condition treated *pro non scripto*. In *Buntin v. Buchanan*, 7th July 1710, the parties required by the father to consent expressly dissented; but the Lords, being of opinion that their dissent was groundless, decreed for the provision in question, stating, however, that if she had married a *turpis persona*, or with great disparity, they would have taken that into consideration. PART I.
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M. 2972.

The tendency of the later decisions, however, has not been to confirm the relaxation of such conditions, upon which Mr. Erskine's doctrine is founded, but rather to give effect to them, not only where stipulated by strangers lying under no obligations to make the provision, but also, except in very special circumstances, in the case of a provision flowing from a parent, in so far as such provision exceeds the amount of the child's legal claims. In *Douglas v. Douglas's Trustees*, 7th February 1792, a declaration contained in a codicil to a settlement, that if the testator's daughter had already married a certain person, she should not derive any benefit from his settlement, was held by the Court of Session to be ineffectual, although the marriage referred to had taken place; but this decision was reversed upon appeal by the House of Lords, and the condition thus received legal effect; and in the case of *Hay v. Wood*, 27th November 1781, a condition that, in case a daughter should marry without her father's consent, a bond of provision should be void, received full effect. In a recent case, the right of the disponee of an estate was made void in the event of her marrying without the approbation of the disponent's trustees first had and obtained. The disponee having married without asking for the consent of the trustees, their approbation, given after the marriage, was held to obviate the forfeiture; *Wellwood's Trustees v. Boswell*, 21st June 1851. 13 D. 1211. In *Reid v. Coates*, 5th F. C. March 1813, a settlement had been made by an uncle upon his nephew, with the condition that he should not reside with his mother or any of her relations, nor should she reside with him. The legatee objected to this as a *lassio pietatis*, absurd in itself, and contrary to law and morality, and which it was impossible for him to obey without violating the established order of nature. But the Court declined to exempt him from the performance of the condition. Here the bequest was made by an uncle, a party under no legal obligation to provide for the nephew. But where a provision has been made by a father for his child, with a condition that she should cease to reside with her mother, who was of irreproachable character, the condition was considered to be clearly *contra bonos mores*, and was held *pro non scripto*; *Fraser v. Rose*, 18th July 1849. 11 D. 1466. The provision in this case exceeded the sum to which the daughter was entitled *ex lege*; but the attempt to exclude a daughter from the society and counsel of a blameless and exemplary mother, was justly looked upon by the Court as an outrage upon morality altogether intolerable on the part of a father.

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OBLIGATIONS
IN UNDUE RE-
STRAINT OF LI-
BERTY, ILLEGAL.
Inst. i. 1, 56.
M. 9454.

The next class of obligations under this head are those which impose undue restraints upon personal liberty. These are no doubt of improbable occurrence now ; and it is only necessary to point out the authorities for holding that they are not binding in law. According to Erskine, marriage, and the liberty of the subject, are favourites of the law. In the case of *Caprington v. Geddeu*, 24th March 1632, a bond by a party engaging to serve another all his life, was found lawful and sustained ; but there is no likelihood that such a doctrine would now be countenanced. In the earlier case of *Wedderburn v. Monorgun*, 6th March 1612, a contract, whereby a party subjected himself to perpetual banishment, was not sustained ; and in *Allan and Mearns v. Skene*, December 1728, fishermen having bound themselves for fifty-seven years to be as *adscriptitii* or *villani*, astriected continually to their respective boats, so that none of them during that time could remove from Johnshaven, or even from one boat to another, was reduced as too great a restraint upon natural liberty.

M. 9453.

M. 9454.

COLLIERS AND
SALTERS.

We may refer here to the former condition of Colliers and Salters, who, by the law itself, without any paction, were bound by merely entering upon work in a colliery or salt manufactory, to perpetual service in it. By the Act 15 Geo. III., cap. 28, this bondage was relaxed from and after 1st July 1775—an object which was more effectually accomplished by the subsequent Statute of 39 Geo. III., cap. 56, passed in the year 1799 ; and such workmen have now the same rights and freedom with respect to their service which the law accords to others.

M. 9455.

The repugnance of the law to restraints upon personal liberty does not extend to such restrictions as persons may, for adequate consideration, reasonably impose upon themselves, with regard to the practice of their trades, or otherwise. Thus in *Stalker v. Carmichael*, 15th January 1735, a stipulation in a contract between two booksellers, that, if at the end of three years either of them should refuse to renew the contract, he should be debarred from bookselling within the city of Glasgow, which was then judged too narrow for two booksellers at a time, was found not to be contrary to the liberty of the subject.

PROFESSIONAL
REMUNERATION
OF TRUSTEES,
AND JUDICIAL
FACTORS.

It only remains to notice here a recent change in the law, which materially affects the position and duties of Law-agents, when compared with an extensive and unhesitating previous practice. I refer to the competency of one of a body of trustees to act in the capacity of factor or agent for the trust. No doubt with regard to the legality of this practice existed until within a very recent period. It had become a matter of familiar occurrence, that a party, having confidence in his Law-agent, confidence in his skill and in his discretion and prudence, selected him as one of his trustees, and that, not for the purpose of excluding him from the office of factor or agent, but

on the contrary in the view of thus securing more effectually the benefit of his agent's services in conducting his affairs. This usage was, no doubt, inconsistent with the views upon which an opposite practice had long subsisted in England. The English practice is founded upon the principle of securing to the trust the benefit of the trustee's superintendence and control over the factor or law-agent, where the assistance of such a person is requisite, all the benefit of a vigilant superintendence on the part of trustees being considered to be lost, when these offices are held by the trustees themselves. Upon this ground it has long been settled in England, that the office of trustee is inconsistent with that of factor, or cashier, or law-agent. In the case of *Montgomerie v. Wauchope*, 4th June 1822, it 1 S. 453. was expressly pleaded, that no trustee is entitled to make profit of the management of the trust; and the opinion of the Court was, that it is consistent with the law and practice of Scotland, for tutors, curators, and trustees, to nominate one of their number, especially one who has been the family-agent of their constituent, to act as their agent and cashier, and that he is entitled to the usual remuneration. This case, however, came under the notice of the House of Lords in the appeal, *Home and Milne v. Pringle and Hunter*, 22d 2 Rob. App. June 1841; and the Lord Chancellor, after referring to the case of 384. *Montgomerie*, in which, although the Judges expressed their opinion, yet no decision had been pronounced upon this point, and after stating the practice in England, said,—“I should be sorry to give “any sanction to a contrary practice in Scotland. There can be no “reason for any difference in the rule upon this subject in the two “countries. The benefit of the rule, as acted upon in England, is “not disputed; and, as there is no decision to the contrary, there “cannot be any reason for sanctioning a contrary rule in Scotland.” Subsequently, in *Seton v. Dawson*, 18th December 1841, the Lord 4 D. 310. Justice-Clerk (HOPK) stated, that he would never be prepared “to “sanction the legality of payment of a salary or profit to one of “trustees to be factor;” and in *Cullen v. Baillie, &c. (Olyne's Trus-* 8 D. 511. *tees)*, 20th February 1846, although there was no express decision upon the point, the Lord Justice-General (BOYLE) intimated, that he would be regulated by the opinion expressed in the House of Lords. Lord MACKENZIE considered that opinion to be so forcible, that no decision could bind the Court to decide inconsistently with it, and that the rule should be known by all men of business; and Lord JEFFREY gave his opinion in accordance with the Lord Chancellor's, adding that, “whenever the legality of such an appointment “shall come into question in this Court again, the authoritatively “expressed opinion of Lord COTTENHAM will be deliberately and “solemnly recognised.” It may be held, therefore, as a rule virtually settled, that the Court will not sanction the appointment of a trustee

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as factor or cashier, to the effect of finding him entitled to remuneration.*

16 D. 721.

* In the case of *Ommanney v. Smith*, 3d March 1854, the defender was sole accepting executor under the will of Mr. Cranstoun; and the testator, on the statement that the defender was a professional gentleman, "and must devote much of his time to my affairs" after my death, as he will be the acting executor," requested his acceptance of £100, as a mark of gratitude, though not an adequate recompense for the zeal evinced by him in regard to the testator's affairs. The defender accepted the office of executor, and at the same time conducted all the professional business of the trust. In his accounts he both charged commission, and also stated the usual charges of an agent for trouble and business in the executry affairs. To these charges the residuary legatees objected; and the Lord Ordinary—upon the principle of the cases of *Borrie, &c., (Finlay's Trustees) v. M'Omie*, 6th March 1852, and *Bon Accord Marine Assurance Company v. Souter's Trustees*, 13th June 1850—found that the defender, in stating his accounts, was not entitled to claim commission, or other law charges, so as to make profit from his intromissions with the executry funds, or from his management of the estate, or business connected therewith. But the Court altered this judgment, upon the ground that the defender had acted as agent for the trust, in the knowledge and with the consent of the pursuers, the residuary legatees, and that it was their understanding that he was to receive professional remuneration. The Court, therefore, found him entitled to make all the usual and proper charges. LORD RUTHERFORD remarked:—"If a trustee take employment upon his own responsibility, or on that of his colleagues, it may be right to say he is not to make a profit by the management of the trust-estate. But if a party, named a trustee on account of a knowledge (it may be) of the trust, is requested to continue as agent in the management, he being a professional man, can it be doubted that in his accounts against the residuary legatees, that is as good a charge as against any other employer?" The LORD PRESIDENT observed:—"We must look not only to the general law, but to the particular circumstances of the trust; and if the truster himself has said that the agent, appointed by him trustee, shall also act as agent for the trust, or if the beneficiaries say so, that would be the law of the trust. If the residuary legatee says so, that also would be a case in which objection would be removed. . . . Therefore, in such a case, he is not entitled to take the services of the party as agent without giving him the usual professional remuneration. He was bound to state the objection at the beginning, if he was to state it at all." The case of the *Bon Accord Assurance Company* was to the following effect:—By the trust-deed of Mr. Souter, his trustees were declared to be liable each for his own actual intromissions, and it was provided that they should not be further liable for any agent to be appointed by them, than that he was reputed responsible at the time of his appointment. There was no power to appoint any one of their own number to be factor or agent. Messrs. Adam and Anderson, however, who were themselves trustees, managed the trust affairs as factors and law-agents, and charged a commission on their whole intromissions at the rate of 5 per cent. An objection to this charge, made by a creditor of the truster, on the ground that no trustee is entitled to make a profit by any act done in connexion with the trust, was sustained. A similar decision was pronounced in the recent case of *Fegan v. Thomson*, 20th July 1855. In the case of *Finlay's Trustees*,—A writer, who had by the trust-disposition of a client been named not only a trustee, but factor for the trust with a suitable remuneration, was employed by his co-trustees to act as agent for the trust in certain judicial proceedings. It was held, that the trustees were entitled to take credit in their accounts for payment to the factor both of a commission or factor-fee, and also of the expenses incurred by him in conducting the judicial proceedings; a distinction having apparently been recognised, on the authority of English cases, to the effect that, where trustees, being more than one in number, employ a co-trustee to conduct *judicial proceedings, in which some law-agent must necessarily be employed*, they are not, in accounting with the beneficiaries, to be held personally liable for the remuneration of the agent. In the same case, it was held by the Lord Ordinary, and acquiesced in, that the factor was not entitled to make charges, as law-agent, for profit, in respect of his trouble in the *extrajudicial* management of the trust affairs; but that he was entitled to charge his outlay, including clerks' fees. See the case of *Flowerden, infra*, p. 68, note.

14 D. 621.

12 D. 1010.

17 D. 1146.

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This change in the law and practice is in accordance with the general principle, whereby persons in a fiduciary position are precluded from making any charge in the way of profit. There is an exception from that rule in the case of a tutor *ad litem*, that officer, unlike other curators, being entitled to professional remuneration; *Pirie v. Collie*, 4th March 1851.

13 D. 841.

There is also profit incident to the office of factors judicially appointed; but these being paid their commission, are not entitled to professional charges besides; *ex parte Rennie*, 26th April 1849. Judgment applied; *Morrison v. Rennie*, 23d November 1849.*

6 Bell's App.
422.
12 D. 163.

We may here refer to the objections which have been stated to deeds, on the ground of their having been executed on the Sabbath-day. A distinction is made in the law of Scotland upon this subject, between judicial acts, including not only the acts of courts of justice but executions of diligence by messengers, (with the exception of warrants against persons in *meditatione fugæ*, which are allowed *ex necessitate*), and the acts of private parties; judicial acts being null, but the voluntary acts of private parties held binding; the former being prohibited partly by statute and partly by the extension of the same rule to other public acts, while the deeds of individuals are left upon their private responsibility as regards the observance of the Sabbath; for the Law permits that to be done privately which, in public matters, it acknowledges to be wrong, and prevents; *fieri non debet, sed factum valet*. So in *Duncan v. Bruce*, March 1684, M. 15,003.

DEEDS EXECUTED ON SABBATH.

it was held not a relevant objection to a bond, that it had been subscribed on Sunday; and in *Elliot v. Faulke*, 20th January 1844, it was held no objection to a bill that it was dated on a Sunday. A

6 D. 411.
13 Sh. 778.

well-known case on this subject is that of *Phillips v. Innes*, 19th May 1835, decided upon appeal, 20th February 1837, in which a barber's apprentice, although bound "not to absent himself from his

2 Sh. & M'Lean,
App. 465.

"master's business, holiday or week-day, late hours or early, without leave first asked and obtained," was held not bound to attend his master's shop on Sunday mornings, in order to shave his customers, that being a matter of convenience, but not of necessity or mercy. The progress of this case exhibited a remarkable alternation of judgment, the magistrates of Dundee, before whom it commenced, having

* Where an agent had undertaken the office of judicial factor, the Court refused to sustain his account for business done by him as law-agent, as a charge against the estate in addition to the usual commission; *Flowerdew*, 22d December 1854. The Court, in this case, allowed those items in the business-account, which consisted of actual outlay; "but the profession should understand that we are not prepared to say that we shall ever again go even that length."

The question is at present before the Court, whether a judicial factor is entitled to derive profit indirectly from his office, over and above his commission, by employing the firm, of which he is a partner, to perform the necessary law-business connected with the factory. The decision of this question will be noticed in the Appendix.

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decided against the apprentice, while Lord JEFFREY, as Ordinary in the Court of Session, altered their judgment, to which, however, the Inner House returned; but the Court of Appeal, in accordance with the unanimous opinions of the Lord Chancellor COTTENHAM, Lord WYNFORD, and Lord BROUGHAM, decided the case finally in favour of the apprentice's exemption from work on Sunday. This decision is founded entirely upon the Statutes 1579, cap. 70, against labouring on Sabbath-days, and 1690, cap. 5, ratifying the Confession of Faith, of which the 21st chapter relates, in its 7th and 8th sections, to the sanctification of the Sabbath.

The mind cannot be turned to this subject without adverting for a moment to professional habits, in relation to the observance of the Lord's Day. This is not the place for treating of that subject on its own peculiar and sacred grounds, but it cannot be wrong to refer here to the experience of Sir Matthew Hale, who traced an unfailing correspondence between a well-spent Sabbath and a successful week's business—a testimony which cannot but be corroborated by those who train themselves to abstinence from secular pursuits and secularity of mind upon the Sabbath, and a faithful performance of the duties of that day, and who find thus not only an unspeakable immediate benefit, but are providing,—by this grateful rest and reinvigoration, and the formation of habits of self-control, and other qualities which may not here be enlarged upon,—the best security for the successful discharge of their professional duties, and the promotion of their secular interests.

We have now considered those objections of a preliminary nature which prevent deeds from being effectually granted, first, on the ground of incapacity in the granter or receiver, and secondly, on the ground that the matter of the deed is such as the Law does not permit to form the subject of contract. There is a third class of objections to deeds, which, as they are fundamental in their nature and effects, it will be convenient to consider in this place. These are—

3. *Objections to Deeds, founded upon the want of proper consent, in consequence of error, fraud, and force or fear.*—It will assist us to see the precise nature and force of the objections now referred to, if we remark that, at an early period in the history of Jurisprudence, all deeds went by the general name of *Voluntates*, i.e., simply the parties' will or pleasure with respect to the matter of the deed. This is a circumstance strongly illustrative of the free consent requisite to the validity of deeds. The principle of this title, viz., that every contract and deed shall be the fruit of a free act of the granter's will, is retained by us, although the name is now limited to being synonymous with "testament." From this doctrine, that a man's contracts

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must be the fruit of his own free will, it follows as a corollary, that the law will not give effect to such deeds as are granted under error with respect to the essence of the matters to which they relate, or which are procured from the granter by fraud practised upon him, or are extorted from him by force or fear; for, where there is error in essentials, the deed is expressive of the granter's will in reference to his own erroneous conception, and not with relation to the real matter in hand; where fraud is practised, the will to grant the deed is founded upon the error which the fraud engenders; and, when force is used, the deed has its immediate cause in the will, not of the granter, but of the coercing party. It is unnecessary to enlarge upon a doctrine which commends itself to the understanding upon principles so just and obvious, and which, accordingly, must find a place in the jurisprudence of every enlightened country. In the formularies of Marculfus, compiled in the eighth century, we find the absence of force and of error generally set forth in the preamble of deeds, thus:—"*Constat me, nullius coactum imperio, neque imaginario jure, sed propriæ voluntatis arbitrio, vobis vendidisse,*" &c. A declaration to the same purpose is contained in a writ dated 1533, cited by Mr. Ross:—"*Ego non vi aut metu ductus, nec errore lapsus, seu dolo circumventus, sed meâ merâ purâ et spontaneâ voluntate,*" &c. We shall refer to a limited number of decisions by way of illustration.

Barbarorum
Leges, ii. 235.

Vol. ii. p. 246.

And first, with regard to error,—A mistake merely with regard to accidental qualities will not suffice to set aside a contract; it must be an error in the very essence of the contract, regarding either the person contracted with or the subject-matter. The distinction between what is essential, and what is accidental or circumstantial, is well illustrated by the example in Stair:—"As if one married Sempronia, "supposing she were Maevia, the marriage hath no farther progress (but by subsequent consent), and it is void. But if he married Sempronia, supposing her to be a virgin, rich, or well-natured, which were the inductives to his consent, though he be mistaken therein, "seeing it is not in the substantials, the contract is valid." An example of essential error with regard to the person contracted with occurs in the case of *Love v. Kemp's Creditors*, 24th June 1786, where a man had furnished goods to a son, upon a guarantee believed to be authorized by his father. This, however, not being the case, the contract was annulled, and the goods restored. And, for an instance of error in the subject-matter of the contract, we may refer to the case of *Hepburn & Sommerville v. Campbell*, 4th July 1781, where a party had bought lands according to a rental, which applied only to two acres and a half; but, after the sale, it was discovered that, although the upset price had been fixed with relation to the rental of that limited extent, the subjects, as described, really amounted to

DEEDS GRANTED
UNDER ERROR
in essentialibus.

I. 9. 9.

M. 4948.

M. 14168.

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ERROR, *contd.*

seven acres. The purchaser contended that he was entitled to the whole seven acres, these having been specially enumerated; but the Court found that the sale was effectual only to the extent of two and a half acres; but that it was optional to the purchaser either to hold his purchase, or to reject the same as he should think fit. In the case of *Hepburn* there were clear *data* for ascertaining what was in contemplation of both parties, and so for establishing the error. But where the sale is of things, so described as undoubtedly to include all falling within the description, the seller will not be heard afterwards to plead ignorance with respect to any of the things so comprehended. So, in a general sale of all the articles *per aversionem* on certain premises, that had been used as a white lead and colour manufactory, the advertisement of the sale referring to paints, varnishes, &c., it was held to be no ground of reduction, that certain vats, admittedly included in the sale, were afterwards found to contain a valuable quantity of white lead, the existence of which was unknown to either party; *Dawson v. Muir*, 6th March 1851. In the report there is a reference to the case, put by *Pothier*, of a golden tripod found in the net, when the cast has been purchased, and which would not be held to go to the purchaser. Such a capture could not be held to be in the contemplation of the parties; and Lord FULLERTON remarks, that the case of the *jactus retis* would be differently decided, where the quantity of fish was unexpected, or the quality unusual, the produce being still *ejusdem generis*. Reference may also be made to the case of *Black v. Cullen*, 1st April 1853, which is a remarkable example of effect denied to a deed, on the ground of error and concealment.—A party had authorized his broker to buy shares for him up to a certain date, which the broker on 15th October announced that he had done. A transfer of shares, signed by the seller on 6th November, was afterwards signed by the purchaser, the price paid, and the transfer retained twelve months by the purchaser. It afterwards turned out that the shares transferred were not those the purchase of which had been advised on 15th October, but others bought on 6th November; while, on 3d November, a call had been made on all the shares of the company, which fact had not been communicated to the purchaser when he took the transfer, nor was he made aware that the transfer did not apply to the shares first purchased. The purchaser having refused to register himself as proprietor of the shares contained in the transfer, it was held that the seller could not compel him to do so, though the seller was not cognizant of the broker's misconduct in substituting the one set of shares for the other; and that the acceptance and signing of the transfer, and payment of the price, did not infer acquiescence by the purchaser in the second purchase, in respect he was not acquainted with the fact of the call, or of the shares being different from those first ordered and bought.

13 D. 844.

15 D. 646.

In cases of fraud, *ubi dolus dedit causam contractui*, the party has not in reality contracted, but has been deceived, and the fraud may be stated by him either by way of exception, when sued for implementation, or he may institute an action to have the contract set aside. It need hardly be stated, that the fraud must be unknown to the party on whom it is practised, since, in the words of Lord Stair, "He who know-
"eth the snare cannot be said to be ensnared, but to ensnare himself." The deceit used must also be an efficient cause of the obligation, which will be sustained notwithstanding the practice of deceit, if it shall proceed independently thereof from the granter's own mind and will.

These points—that the fraud must be inherent, *dans causam contractui*, and that the objection is irrelevant if the party discovers the fraud before executing the deed—are both exemplified in *Irvine or Douglas v. Kirkpatrick*, 2d August 1850. This case shews also, that the objection of fraud is not excluded by lapse of time. "A Court of Equity," it was said, "will overleap the barrier of time, to get at the fraudulent parties and their deeds, and to undo these deeds, and to prevent any one, whether accomplice or innocent, from profiting by the fruits of fraud." In *Walker v. Young*, 24th December 1695, a father absconded, having reported himself to be dead, and his son acted as his successor for several years, and obtained loans, after which the father reappeared, and competed with the son's creditors for the goods affected by their diligence. The Lords regarded this as a fraud, and preferred the son's creditors. A remarkable instance of circumstantial fraud is presented in the case of *Thomson v. Henderson*, 4th December 1665. There a party had granted a bond for a sum of money to his brother, who assigned the same to a third party; the assignee having given a charge to enforce payment, the debtor suspended and produced a discharge by his brother, the original creditor, bearing the same date and witnesses as the bond. The Lords required the suspender to shew some reasonable cause for taking a discharge at the time he granted the bond.*

The Statute 1696, cap. 5, is directed against preferences granted

* See also the case of *Watt v. Findlay*, 20th February 1846. There a party had purchased whisky, to be paid for on delivery. At the time of delivery he induced the seller to give him credit for the price, concealing the fact that he was bankrupt, and had already taken steps to obtain sequestration, which was shortly afterwards awarded. It was held, in a question between the seller and the trustee on the purchaser's sequestrated estate, that the delivery had not, in respect of the fraudulent conduct of the purchaser, so vested the property in him that his creditors could take advantage thereof. This case was founded on as a precedent, in that of *Richmond v. Bailton*, 26th January 1854. But there, in a question with general creditors, the seller was held not entitled to claim restitution of the goods delivered, and reduction of the sale on the ground of fraud, in respect his conduct, in dealing with the purchaser subsequently to the sale and delivery, was such as to deprive him of the remedy, which might otherwise have been competent.

In reductions upon the ground of fraud the pursuer, in order to make his action relevant, must specifically set forth circumstances from which fraud may be inferred. He must "aver

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FRAUD dans
causam con-
tractui.

i. 9, 9.

7 Bell's App.
186.4 Br. Supp.
290.

M. 4906.

REDUCTION OF
PREFERENCES
UNDER ACT
1696, cap. 5.

8 D. 529.

16 D. 403.

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CHAPTER I.
FRAUD, *contd.*

- by parties on the eve of bankruptcy in favour of particular creditors. These are justly accounted frauds, inasmuch as a party labouring in his circumstances cannot give any portion of his property to one creditor without injuring the rest by diminishing the means of their payment. This enactment, accordingly, declares to be null all dispositions, assignments, and other deeds granted by the bankrupt directly or indirectly within sixty days of bankruptcy, either for the satisfaction or further security of any creditor in preference to the other creditors. For an instance of a preference granted indirectly being reduced, see *Barbour v. Johnstone*, 30th May 1823.*
- 2 S. 851. But this statute does not strike at deeds which, though granted within sixty days of bankruptcy, yet are in specific implement of obligations previously granted at a greater distance of time; *Cranstoun v. Bontine*, 2d February 1830; affirmed on appeal, 6th July 1832. But, in order to give the deed this protection, it must be made in implement of an engagement instantly to grant a security as the consideration of an advance. When, therefore, the obligation was to assign at any time *when required*, an assignment made within six days of bankruptcy was found reducible under the statute; *Moncreiff v. Hay*, 16th December 1851.†

IMPETRATION
BY FORCE OR
FEAR VITIATES
AN OBLIGATION.

- The obtaining of deeds by force, which Lord Stair calls extortion, is well described by him as “the act of force or other mean of fear, whereby a person is compelled to do that which of his proper inclination he would not have done.” It is more easily sustained in the case of parties subject to natural facility or weakness, and especially in the case of wives; and more readily where the deeds challenged are either gratuitous, or granted for an inadequate consideration. This objection enters so deeply into the constitution of the contract as to produce a *labes realis*, or inherent vitiation, so as to affect the ground of debt even after it passes into the hands of a third party; *Wightman v. Graham*, 6th December 1787. There a bill, granted under the terror of imprisonment, was found of no validity even in the hands of an onerous indorsee. In *Stuarts v. Whitefoord*, 10th January 1677, a disposition of lands was reduced, having been granted in favour of a party who had apprehended the granter with-

- “such a state of facts as shall, if the jury find it proved, amount to fraud in the view of the Court.” It is otherwise in cases where malice and want of probable cause are averred, and are necessary to the relevancy of an action, the averment of the details from which these are to be deduced not being required. They are for the Jury, not for the Court; *Smith v. Watt's Trustees*, 20th January 1854.
- 16 D. 372.

* The opinions of the Judges in this case are given in a note to 7 Shaw, p. 752.

† The doctrine—that specific performance of an obligation is not viewed as a voluntary deed granted to a creditor for his satisfaction, and so reducible under the statute; and, in particular, that delivery by a seller to a buyer of what has been sold by the former to the latter beyond the sixty days is not such a reducible deed—is illustrated in *Taylor v. Ferris*, 8th March 1855—a case in which the whole Judges were consulted.

- 17 D. 639.

out a warrant, kept him two days prisoner in his own house, then had him apprehended upon a caption following on a decree granted by himself, and carried him from place to place in the night, without the knowledge of his friends, for many days, until he extorted the disposition from him. In *Cassie v. Fleming*, 27th June 1632, it was found relevant to reduce a wadset granted by a married woman, that she was compelled to consent to it, being beaten by her husband to the effusion of blood, and menaced by him, and otherwise abused, and expelled out of his house. So likewise in *Tait v. Wilson*, 4th June 1831, a discharge by a married woman was reduced, on the ground that it had been extorted from her by imprisonment for thirty days. M. 10279.
9 S. 680.

Another example of deeds, inoperative on account of the fear presumed in law necessarily to exist in the circumstances of their execution, is presented in the case of consent given by the heir-at-law to dispositions granted to his own prejudice on death-bed. Such consent is not allowed to preclude the heir's right of reduction; *Inglis v. Hamilton*, 4th December 1733; because, as Erskine says, few heirs, from fear of being disinherited, would dare refuse to sign such renunciations. M. 3327.

From the exception of *vis aut metus* is exempted the fear which results from the regular execution of lawful diligence; and it is only such deeds granted under the pressure of diligence as have no relation to the debt upon which that diligence has proceeded, that will be reduced. The Court, by an equitable application of this doctrine—where a party had, while imprisoned for debt, executed a disposition of heritable property in favour of the incarcerating creditors, who sold it for a price exceeding their claims—reduced the disposition, excepting in so far as it should operate as a security for the debt owing to the disponees; *Fraser v. Black and Knox*, 13th December 1810. F. C.

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THE STATUTORY SOLEMNITIES OF DEEDS.

WE have now disposed of the inquiries naturally demanding attention antecedently to the examination of the necessary qualities of deeds—having ascertained (in a negative form by determining the exceptions) the qualifications which capacitate parties to grant or receive deeds ; having ascertained also those elements in things which seclude them from the class of matters about which deeds may legally be granted and received ; and having also inquired into such circumstances preliminary to the subscription, as deprive the deed of the essential property of the granter's free deliberative consent. The next part of the subject which will engage our attention is the mode of investing deeds with authority, in order that they may be received, and have effect given to them, as undoubted acts of the parties who grant them.

The first thing to be ascertained, then, is this—What is essential to a writing, in order that it may receive effect as an act done by a party for the purpose of affecting a right belonging to him ? The writing which expresses and constitutes the completed evidence of such an act is called a deed—in Latin, *factum*—as, emphatically, a thing of high importance done with respect to property. Now, how is it to be made clear that this deed is truly the real and deliberate act of the party by whom it professes to have been granted, and that it is not falsely ascribed to him ? How is it to be impressed with such credentials, that it shall obtain what our old legal phrase calls “faith in judgment”—that is, credit in a Court of Law as being truly the act of the granter ?

In order to obtain a distinct conception of the meaning and effect of the forms used for the purpose of securing the authenticity of deeds, it will be advantageous to take a brief review of the practice which obtained before the establishment of the solemnities now observed ; and as this character of authenticity is a quality indispensable to every deed which professes to be executed according to the legal requirements, and as the want of that quality is the first point of attack in every challenge of a deed, we cannot bestow too much

pains in obtaining a thorough knowledge of this, which lies at the foundation of the subject.

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The Laws of no country, perhaps, contain a more striking example of anxious and effectual precautions to authenticate a party's deed or act, than is found in the provisions of the Civil Law for the attestation of testaments or last wills. These forms of attestation were referred to in the discussion, and by Lord Chancellor ELDON in the decision, of a case to which we shall presently have occasion to refer as settling several important points in this branch of our Law ; and it will, therefore, be useful to state shortly the forms observed in making a will according to the Law of Rome. We could not otherwise, probably, obtain a better notion of the true object and effect of solemnities in the execution of deeds.

ATTESTATION
OF TESTAMENTS
ACCORDING TO
ROMAN LAW.

Without dwelling upon the form which prevailed in the first instance of making wills in the *Comitia*, so that they took effect as acts of the supreme power of the State, or upon that which obtained afterwards of making a present sale *fictione juris* of the testator's succession, it will suffice to note the forms ultimately observed.

A will might be in writing or verbal, *scriptum vel nuncupativum*. But in either case the observance of every prescribed solemnity was required under the pain of nullity. Solemnities were internal or external. The internal requisite was, that an heir should be appointed in direct or imperative terms, such as "*Titius hæres esto*." The external solemnities, and these are for our present purpose, were—*1st*, That the will should be *uno contextu*—that is, made by one continuous and uninterrupted act. *2dly*, It was necessary that seven witnesses specially called should be present ; and no female, or pupil, or servant, or insane person, or one who could not speak, or hear, or see, or any person of bad character, could act as a witness ; neither could the heir, or one subject to the *patria potestas* of the testator or of the heir. These solemnities were common to the written and nuncupative wills. In the written will it was required, *3dly*, That the testator should either himself write it, in which case it was called a holograph testament, or that he should subscribe it ; or, if he could not write, he was required to procure an eighth witness to subscribe for him. *4thly*, That the witnesses should not only subscribe the will, but also set their seals to it. In the nuncupative will it sufficed, if the testator declared his last will *viva voce* in the presence of seven proper witnesses called for the purpose, and who both saw the testator and understood him.

Now, from all this there are two lessons to be learned :—The *first* is, that the will was equally valid whether it was written or verbal. The writing, therefore, was not essential, although, if adopted, it required to be done in due form. Thus the writing—that is, what we call the

LESSONS TO BE
LEARNED FROM
THE MODE OF
EXECUTING TES-
TAMENTS AC-
CORDING TO THE
CIVIL LAW.

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deed—was not, strictly speaking, the will. The will—the essence of the thing—was the “*Sententia voluntatis*,” the declaration of his will by the testator—the desire and act of his mind as expressed either in words or in writing. The will took effect whether it was written or not. The only use of the writing, therefore, was, that it more certainly preserved evidence of what the will was. Now this is a distinction which it is useful to bear in mind, viz., that even where writing is by law made essential, (for words are by a general principle of law sufficient to constitute an obligation, unless writing be required,) the deed, i.e., the writing, is not the operating act of the grantor. His mental act is that which constitutes the right of the grantee, and the deed is the evidence of that mental act. This is clearly shewn by the power under our Law, when a deed is lost, to supply its place by judicially proving its tenor. If the deed constituted the right, then the right would be lost along with it; but the right remains, having been created by the mental act of the grantor, although the evidence of it is impaired by the loss of the deed. At the same time it must be kept in view, that, although the operating energy of a transaction depends upon the mental act of the grantor, that mental act must be declared and made known in the way which the Law has required; otherwise it is clear that no benefit can accrue to the party in whose favour it is granted; and where solemnities are prescribed under the sanction of nullity, the consequence of omitting a solemnity so prescribed is, that no effect can be given to the deed or other attempted declaration, any more than if the act had remained undeclared in the mind of the grantor. The *second* lesson which we are taught by the singularly stringent conditions under which the Roman will was made, is the purpose of solemnities in the execution of deeds. What was the end of these solemnities in the case cited? The calling of so many witnesses so carefully selected, their subscriptions and their seals, added nothing to, and in no way affected, the intention—the will—of the testator, as that intention and will existed in his own mind. It was not to help him to make up his mind that the witnesses were called. The design of the whole complicated ceremonial was simply this, to make assurance sure, that the will, as expressed in writing or in words, was in truth the *voluntatis sententia*—the very mind and will of the testator. The whole proceeding was directed to this end. The calling of seven witnesses was itself a strong evidence of the formed intention to make a will; the concurrence of seven witnesses, especially when all who might be biassed or incapacitated by influence, venality, or infirmity, were excluded, was a singularly strong proof of the purport of the will; and when the will was written, the writing or subscription of it by the testator, and the subscription and sealing by all the witnesses, afforded the strongest guarantee that, after the testator's death,

his very will and intention would exist in the precise terms in which it flowed from his own mind and lips.

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The design of solemnities in the execution of deeds, then, is to make it certain that the thing, stated in the deed as done, was really the mind and act of the granter. The law fixes certain forms to be observed by the maker of a deed, and says to him, "The observance of these forms shall be the test whether you were in earnest." If they are observed, the deed will receive effect; if they are not observed, the deed will not receive effect. Solemnities are thus the legal tests of the validity of deeds.

DESIGN OF SO-
LEMNITIES IN
EXECUTION OF
DEEDS.

The method and details of the execution of deeds among the Romans are characteristic of the high degree of civilisation to which that people had attained. A history of the modes of executing deeds in Scotland and England, would be illustrative chiefly of the confinement of the art of writing, and of the advantages connected with it, to the Clergy before the Reformation,—of the influence of religion and its associations carried into the ordinary secular transactions of life,—and of the rapid advancement of education in Scotland after the Reformation.

The seal is that part of the execution under the Civil Law which was most generally retained after the fall of the Roman Empire; and this was a mode of authentication not peculiar to that Law, but derived by it, probably, from more ancient sources. From the book of *Esther* we find, that sealing was in the East the mode of authenticating Royal mandates—"For the writing which is written in the king's name, and sealed with the king's ring, may no man reverse." There are other instances in the Sacred Writings of the use of seals, and the book of Jeremiah contains in its 32d chapter an account of the purchase of a field—"I subscribed the evidence and sealed it, and took witnesses, and weighed him the money in the balances." Sealing, however, was not a mode of authentication used in the earlier writings with which we are acquainted in Scotland. It is the opinion of some, that the Scotch borrowed from the Anglo-Saxons their method of authenticating deeds. Amongst the Saxons such persons as could write subscribed their names, and whether they could write or not, they affixed a mark in the form of a cross,—a mode of subscription which is in use among the illiterate at the present day. A charter is preserved bearing the subscription by a cross of one of the Saxon kings, with the ingenuous confession that it was so signed on account of his inability to write. That this mode of subscription had a religious import, appears from the terms of the attestation of this charter:—"Propriâ manu pro ignorantia literarum SIGNUM SANCTE CRUCIS expressi et subscripsi." And it is equally clear from other evidence, that the signature by a cross was regarded as imparting to the deed upon which it was subscribed the preserva-

AUTHENTICA-
TION OF DEEDS
BY THE SEAL OF
THE GRANTEE.

viii. 8.

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Ross's Lectures, p. 123.

tive influence of a charm—a feeling expressed in the rhyming hexameter, "*Per crucis hoc signum fugit hinc procul omne malignum.*"

On the fourth page of Anderson's *Diplomata*, there will be found a charter of Duncan I. of Scotland, attested by the cross of the king and crosses made by the writer of the deed and by various witnesses. The last mentioned charter has appended to it also the seal of the king, and in this he is supposed to have imitated William the Conqueror, who introduced the practice of sealing as the sole mode of attesting writings. The Normans did not subscribe, because they could not write; and the practice of subscribing was abolished in England after the Conquest. The impressions of their seals consisted of a knight on horseback, or other devices; and coats of arms were not introduced until after the Crusades, during which they were first used for the purpose of distinguishing different countries and persons. The practice of execution by sealing alone continued in England until the time of Charles II., when the Saxon custom of signing was revived by statute, although it does not appear to have come rapidly into general observance; and hence the common form of attesting English deeds, "*sealed and delivered,*" continued long after the additional formality of signing was required by statute. The form of execution in Scotland appears to have followed the English practice; and this circumstance may be attributed with probability to the connexion of both countries with the Church of Rome, whose clergy long possessed almost exclusively the art of writing. Accordingly, we find deeds prior to the year 1540 executed by the seal of the grantor alone, the names of witnesses being inserted at the end of deeds relating to important matters. The test of the authenticity of a deed, therefore, was the correspondence of the seal appended to it, with the known seal of the grantor bearing his coat of arms or his initials. Such a system was manifestly imperfect, and liable to abuse; and it was probably as a precaution against the falsification of seals, that freeholders were required, by an Act of James I., 1429, cap. 130, to attend, personally or by their attorneys, and to produce their seals at the sheriff's head court.

Stair, iv. 42, 5;
Mackenzie, i. .
253; *Reg. Maj.*
iii. 8, 4.

AUTHENTICA-
TION BY SEAL,
contd.

It may be noticed that *MAGNA CHARTA* was executed before witnesses; and this continued to be the practice in deeds by the Sovereign of England until the time of Richard I., who altered the style to "*teste me ipso,*" which form still continues. In deeds by subjects, again, the names of witnesses present were inserted in a clause commencing with the words, "*his testibus,*" which was discontinued in the reign of Henry VIII., when, upon the revival of learning, writing having become more general, the practice was introduced, which still prevails, of witnesses subscribing their attestation either at the bottom or on the back of the deed. In like manner, in Scotland the names of witnesses present either accidentally or upon requisition were

mentioned in deeds, anterior to the period when the subscription of witnesses became first customary, and afterwards, as we shall presently find, a statutory requisite. But as long as sealing remained the legal form of executing deeds, it was not essential to the validity of the deed that it should be witnessed. This appears from the case of *Town of Edinburgh v. Town of Leith*, 11th March 1630.

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M. 14500.

The inconveniences connected with the attestation of deeds by sealing are distinctly stated by Sir Thomas Craig, who says:—*Lib. 2. Dieg. 4.*

“Eighty years since unlimited faith was given to deeds, although they were authenticated by the seal of the disponent alone; but frequently after his death many inconveniences were occasioned by fraud on the part of his widow, or of the person who had obtained possession of his seal, and it often happened that dispositions concocted after the death of the proprietor were authenticated by his seal.” These evils called loudly for a remedy, and accordingly the Act, to which I am now to direct your particular attention, was passed with the approval, according to Craig, of all classes. That Act is the first of the several statutes by which the execution of deeds is now regulated. It was passed in the latter end of the reign of James V., who, although he resisted the attempts made by Henry VIII through his ambassador to detach him from adherence to the Church of Rome, and supported measures of extreme severity to smother the Reformation in its infancy, yet pursued an enlightened policy in other respects, of which a remarkable example was, that, in this same year 1540, in order to diffuse a knowledge of the laws among the inferior judges and the body of the people, the Acts of Parliament were ordered to be printed from an authentic copy attested by the sign-manual of the Clerk-Register. Such an order implied advancement in general knowledge and intelligence—a conclusion strikingly confirmed by what occurred two years later, after the death of this monarch, when liberty was granted to read the Bible in an approved translation. 1540, c. 117.

The statute now referred to is chapter 117 of the seventh parliament of James V., 1540. Its preamble corresponds with the statement of Craig, being in these terms:—“Because mennis seales may of adventure be tint, quhairthrow great hurt may be genered to them that awe the samin; and that mennis seales may be feinzieid or put to writings after their decease.” And it enacts:—“That therefore na faith be given in time cumming to ony obligation, band, or uther writing under ane seale, without the subscription of him that awe the samin, and witnesse; or else, gif the partie can not write, with the subscription of ane notar thereto.” This statute is the foundation of the present system of executing deeds, its grand feature being, that, in place of the previous unsatisfactory practice of sealing, it required the subscription of the party either by his own

EARLY STATUTORY REQUIREMENTS AS TO EXECUTION OF DEEDS.
1540, cap. 117.

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hand, or, if he could not write, by the hand of a notary. It was defective, however, inasmuch as, while witnesses were required to the subscription of the party, there was no injunction that the witnesses themselves should subscribe, and it was left doubtful whether witnesses were necessary at all in the case of subscription by a notary; nor did the Act contain any provision for inserting in the deed, or otherwise preserving, the names of the witnesses where they did not subscribe, or their designations whether they subscribed or not. Mr. Ross, in commenting upon Lord KAMES' strictures upon the Act 1540, says:—"That Act expressly requires the subscription both of the party and of the witnesses." In this, however, he is not borne out by the terms of the Act, which, although it required witnesses, is silent as to their subscription; and the practice which followed upon it shewed that it was understood to contain no express rule upon this point. In some instances the witnesses subjoined their subscriptions, and in others they did not subscribe, though their names were inserted in the deed; and the latter practice, which was the more common, left it much in the power of the granters of deeds to commit frauds by naming witnesses suitable to their own purposes, either where the deed had not been legally executed, or where the execution had been regular, but the real witnesses were removed. Another inconvenience attendant upon the Act 1540, was found in practice to result from the character of the notaries of that time, which was not such as to afford sufficient security against fraud, where the intervention of only one notary was required. It was attempted to correct both these evils, viz., the uncertain and lax practice with respect to witnesses, and the insufficiency of one notary, by the Act of James VI., 1579, cap. 80. By this statute it was ordained, "that all contractes, obligationes, reversiones, assignationes and discharges of reversiones, or eikes theirto, and generallie all writtes importing heritabill titill, or utheris bandes and obligationes of great importance to be maid in time cumming, sall be subscribed and seilled be the principall parties gif they can subscribe, urtherwise be twa famous notars befor four famous witnesses, denominat be their speciall dwelling-places, or sum uther evident takens, that the witnesses may be knawen being present at that time, urtherwise the saidis writs to mak na faith." This enactment, which is stated by Sir George Mackenzie to have been framed upon the model of a similar law made in France in the year 1556, expressly requires, it will be observed, that the party should still seal as well as subscribe, the solemnity of sealing having likewise been continued by implication in the previous Act of 1540. By the subsequent Act 1584, cap. 4, it was declared that, with respect to sealing, the Act should not apply to such writs, contracts, or obligations, as the parties agreed should be registered in the books of Council or other Judges' books, registration being a more

solemn act than sealing. Although sealing was thus dispensed with in such deeds only as contained the parties' consent to registration, the practice immediately afterwards fell into disuse in all deeds; and it has long been settled, that sealing is not a solemnity in the execution of deeds; but as it is dispensed with by express statute only in deeds agreed to be registered, the validity of other deeds which are not sealed rests only upon a long course of inveterate and incontroverted custom. This is laid down by Sir George Mackenzie, and it may be regarded as the more remarkable, since, by the Act 1686, cap. 4, passed only five years before his death, sealing, or as it is called in the Act, stamping, was dispensed with in all judicial citations and executions of diligence. i. 254.

The Statute of 1584 thus put a termination to the practice of sealing, by express enactment as regards deeds consenting to registration, and by the force of example and practice as regards other deeds. But the evils which the previous Act of 1579 was intended to remove, were but imperfectly remedied by that statute. No doubt it enjoined the presence of four famous witnesses—that is, witnesses of good credit—in the case of subscription by the party's own hand, as well as by the intervention of two notaries; and it directed that the witnesses should be denominated by their dwelling-places, or other evident tokens; but it was not required that the witnesses should subscribe, nor was it with sufficient precision enacted that either their names or their designations should be inserted in deeds executed by the subscription of the granter himself. From this there necessarily followed, as before, a variety of practice; and instead of a deed carrying, as it now does, its credentials within itself, parties were allowed to supply the want of the witnesses' names by condescending upon them afterwards—a system which necessarily rendered the authenticity of deeds still dependent upon the uncertain security of oral evidence. It may have been that in the sixteenth century the art of writing was not yet sufficiently common to leave the course of business open and practicable, had it been required that every deed should be attested by four or even by two witnesses who could write. This imperfection continued during a period of more than one hundred years after the passing of the Act 1579.

In the meantime, another source of distrust had arisen, in consequence of important deeds being written by unknown persons; and, in order to prevent this, and to provide an additional means of scrutinizing the authenticity of deeds, it was declared by the Act 1593, cap. 179, that the name, surname, and other denomination of the writer of the body of all deeds, should be mentioned at the end of the deed before the inserting of the witnesses. This is a statute still in force, and we shall presently have occasion to examine it more minutely. At present it is sufficient to mention that the Court felt

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EARLY STATUTORY REQUIREMENTS, *contd.*

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REQUIREMENTS
OF ACT 1681,
c. 5.

itself at liberty to apply an equitable construction to the enactment, and allowed the writer to be condescended upon, even in cases where, contrary to the express injunction of the statute, no mention whatever was made of his name in the deed.

The various imperfections, to which we have referred, were at length remedied by the Act 1681, cap. 5—a statute prepared, it is believed, by Lord STAIR, and which demands the most careful attention, as containing the final provisions of the law for securing the authenticity of deeds. The preamble or inductive cause of the statute is,—“That, by the custom introduced when writing was not so ordinary, witnesses insert in writs, although not subscribing, are probative witnesses, and by their forgetfulness may easily disown their being witnesses.” For remeid of this the statute enacts:—“That only subscribing witnesses in writs to be subscribed by any partie hereafter shall be probative, and not the witnesses insert, not subscribing; and that all such writs to be subscribed hereafter, wherein the writter and witnesses are not designed, shall be null, and are not supplyable by condescending upon the writter, or the designation of the writter and witnesses.” The statute also declares,—“That no witness shall subscribe as witness to any partie’s subscription, unless he then know that partie and saw him subscribe, or saw or heard him give warrand to a nottar, or nottars, to subscribe for him, and in evidence thereof touch the nottars pen, or that the partie did at the time of the witnesses subscribing acknowledge his subscription, otherwise the said witnesses shall be repute and punished as accessorie to forgerie;” and, upon the ground that writing had become so common, the Act goes on to require subscribing witnesses in instruments of sasine, and other deeds specified, and in messengers’ executions of inhibition and other diligences, and in executions intended to interrupt prescription in real rights; and that the witnesses be designed under pain of nullity.

It may be remarked, in passing, that the important statute just cited, and which was made during the reign of Charles II., is just five years posterior to the English statute of the 29th year of the same Sovereign, cap. 3, which required subscription by the party and by witnesses in various important deeds; and it was from this date (1676) that the word “*signed*” was first added to the words “*sealed and delivered*” in the attest of English deeds, although we learn from Blackstone that, even after this date, the attest was used without the word “*signed*,” it having been held, strangely enough, that the act of signing was included in that of sealing.

We have thus taken a review of the statutes regarding the attestation of deeds from the earliest date, until the completion of these enactments by the Act of 1681, and it is necessary, in order to a

complete knowledge of the law on this important subject, that we now institute a minute investigation of its requirements, as set forth in the statutes or established by the decisions of the Courts of Law, with reference separately to everything which is *de solennitate* in the execution of deeds. At the same time, it will be advantageous to notice in their natural order other things useful in practice, which are connected with the statutory solemnities, although not embraced in them.

1. *Who may write a deed ; and what is requisite with respect to the writer ?*—Any person may be the writer of a deed to be granted either by himself or by another ; and where the deed is written by the granter himself, that circumstance is justly considered a pregnant proof of its genuineness—so much so, that deeds written by the granter, and which receive the name of *holograph* deeds, are among those privileged writings which are exempted from observance of the statutory solemnities. Our attention will be directed to the subject of Privileged Deeds, after we have discussed those requiring the solemnities, from which class they are usually treated as exceptions.

We have seen that, with the view of preserving a clue to the preparation and history of the deed, it was required by the Act 1593 cap. 179, that the writer's name should be inserted. The terms of this statute are very special. It declares, "that all original chartoures, "contractes, obligationes, reversiones, assignationes, and all uthers "writtes and evidentes to be maid hereafter, sall make special mention in the hinder end thereof, before the inserting of the witnesses "therein, of the name, surname, and particular remaining place, "diocesie, and uther denomination of the writer of the bodie of "the foressaid original writtes and evidentes, utherwaies the same "to make na faith in judgment." We have seen that the Court so far infringed upon the express terms of this statute as to allow the omission of the writer's name to be supplied by condescence. The Act 1681 cap. 5 corrected this practice, by making the omission of the designation of the writer and witnesses a nullity, and not suppliable by condescence. The latter statute may be held at the same time to have qualified the anxious terms in which the Act 1593 required the writer to be designated by his dwelling-place, diocese, and other denomination. These terms are not repeated in the later Act, but the single word "designation" is used—a term which signifies the marking out of a person so as to distinguish him from all others. It was accordingly held in the case of *Duncan v. Scrimseour*, 15th February 1708, that the writer of a deed was sufficiently designed by the insertion of his dwelling-place, without any other distinction ; and it is now settled by long and unvarying practice, that the writer's designation is complete, *dummodo constet*

WRITER OF
DEED.

THE INSERTION
OF THE NAME
AND DESIGNA-
TION OF THE
WRITER OF THE
BODY OF A
DEED IS A STA-
TUTORY SOLEM-
NITY.

M. 16914.

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14 D. 583.

de personâ—i.e., if it be such as to distinguish him from all others. In *Henderson v. Smith*, 28th February 1852, a party being described “manager and for behoof of the Western Bank of Scotland,” that was sustained as a sufficient designation. But the judgment was not unanimous, and such questions should be prevented by studying explicitness and precision.

WRITER OF
DEED, *CONFE.*

M. 16870.

M. 17026.

It is also conclusively settled, not only by the express terms of the statutes, but also by a long series of decisions, that the omission to insert the name and designation of the writer of the deed is fatal to its validity. See *Duke of Gordon v. Gordon*, 16th June 1761; and *Logie v. Ferguson*, 4th January 1710. In the latter case the Lords found an obligation null for want of the writer’s designation, although the pursuer offered to prove by the defender’s oath that the obligation had been truly subscribed by the defender’s father, and was still unsatisfied. In this case it was also ingeniously argued, that although the Act 1681 prohibits the supplying of the omission by condescendence, yet it does not prohibit the supplying of it by other methods; but the plea did not avail. In the case of *Percy and Caldwell v. Meikle*, 25th November 1808, a decree-arbitral was challenged, on the ground that it did not contain the writer’s name; and, although it was written by the clerk to the submission, who subscribed the decree as clerk, and who was also designed in the narrative portion of it both by his personal designation and by his office of clerk to the submission, still the document was reduced, upon the ground that it contained no mention of who was the writer. In *Lockhart v. Kay*, 16th February 1815, a disposition of lands was reduced, because the writer of it was not mentioned, although he was a subscribing witness, and there were probable grounds for inferring from the terms of the testing clause who the writer was. Finally, a deed having been recorded before inserting in it the writer’s name and designation, the Court was moved to sist a process of reduction till the testing clause should be completed. But the Court refused, on the ground that to authorize the addition prayed for would be truly to allow a condescendence of the writer’s name and designation, which the Act 1681 expressly forbids; and the deed was therefore reduced; *Barclay v. Brown*, 8th February 1811. The question has been raised, whether it be essential to insert the writer’s name and designation in the body of the writ. The Act 1593 enjoins the insertion thereof in the end of the writ, “before the inserting of the “witnesses,” while the statute of 1681 is not thus particular, but simply declares to be null all writs wherein the writer and witnesses are not designed; and it is worthy of observation, that in the repetition of the nullity, which occurs at the end of the statute 1681, and which is the only part of this Act that expressly names “the body “of the writ,” the writer of the deed is not referred to. The words

F. C.

F. C.

Hume, 923.

are:—"That in all the saids cases the witnesses be designed in the "bodie of the writ, &c. . . otherwise the same shall be null and void." The point was tried in the case of *Dronnan v. Montgomery*, 26th July 1716. Here the body of the writ made no mention of the writer, but it contained the names and designations of the witnesses, and one of these witnesses, who was the writer of the deed, added to his subscription the words "witness and writer hereof." The Court repelled the objection and sustained the deed. Although it was thus held not requisite to mention in the deed, by whom it was written, when the fact of who was the writer appeared otherwise upon the face of the deed, and his name and designation were inserted in the character of witness, it would be dangerous upon the authority of such a case to depart from the established rule of practice according to which the writer's name and designation are invariably inserted.*

But although it may be held as a settled rule that the writer's name and designation must be inserted, it is not indispensable that this should be done by his own hand. Where the body of the deed is written by one person, and the name and designation of the writer are inserted by another, it is held that the statutes are complied with. This was found in the case of *White v. Henderson*, 21st February 1710; and it is common in practice for deeds to be written by one hand, and the writer's name and designation, with the particulars of the execution, to be filled in by another. It has also been decided, that where a deed is completed by the hand of a different person from the writer of the body of it, it is no nullity that the inserter of the date and witnesses' names is not named and designed. This was settled in the case of *Watsons v. Scot*, 29th November 1683; and the same was found by Lord COREHOUSE in the case of *Andrews v. Sawyer*, 2d March 1836; but this part of his judgment was not reviewed when the case was discussed in the Inner-House. In *Lindsay v. Giles*, 27th February 1844, it was objected to a deed, that although it declared that the place, date, and witnesses' names and designations were written by a person named, yet there was an intermediate portion containing the description of the writer of the deed, the number of pages, and the fact of subscription; that this material portion was not written by the writer of the body of the deed, and it was not therefore mentioned by whom it was written. But this plea was disregarded. The correct practice, however, is to give the name and designation of the party who inserts the particulars of the execution,

* The writer of an assignation, who was also a subscribing witness, was not stated in the testing-clause to have been the writer. In a process where the assignation formed a party's title, it was produced, the record closed, and the defect that the deed did not name and design the writer alluded to in an interlocutor, although not made matter of judgment. Thereafter the words, "and writer hereof," were added by the witness to his subscription as witness. The Court held the deed to be duly tested; *Macpherson v. Macpherson*, 7th February 1855. See *infra*, p. 119.

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CHAPTER II.
M. 16869.

WRITER OF
Testing-clause
NEED NOT BE
NAMED AND
DESIGNED.

M. 16864.

M. 16860.

14 S. 589.

6 D. 771.

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as well as of the writer of the deed. He will frequently be a person who has been present at the execution ; and a deed which professes to bear upon its face the credentials of its own authenticity, ought to furnish full information for the narrowest scrutiny of all the circumstances connected with its subscription.

WRITER OF
DEED, *contd.*

M. 8838.

Where a disposition of lands was objected to upon this among other grounds, that the designation of the writer of it, (" John Scott, clerk to the Signet," instead of " John Scott, clerk to Cornelius Elliot, " writer to the Signet,") was erroneous, it was held that such an objection was not proper for the judgment of a Court of freeholders, the deed being *ex facie* regular ; *Scott and Kerr v. Dalrymple*, 17th January 1781 ; but this decision, it will be observed, settled only that this particular Court was not a competent *forum* to adjudicate upon such a question ; and it cannot be held to afford any countenance to the idea, that an error in designing the writer of a deed is immaterial. The careful conveyancer must not allow himself to be betrayed into any laxity of practice in this particular, although isolated cases are to be found in the books, where very meagre and uncertain designations were sustained by the Court, as in the case of *Rules v. Craig's Creditors*, 20th February 1712, where the writer was designed merely " John Russel, writer," without any further description.

M. 16920.

M. 1352.

In *Ewing v. Semple*, 20th July 1739, the writer was not named and designed before inserting the witnesses ; but the bond bore to be subscribed " before these witnesses John Buchanan maltman in Dum-barton, and Adam Colquhoun servitor to James Duncanson at " Garshake, writer hereof"—which, it was argued, left it doubtful whether Adam Colquhoun or James Duncanson was the writer. It was answered that the bond plainly shewed that Adam Colquhoun, the witness, was also the writer ; and the deed was sustained. It may be here remarked, that the Court is always disposed to give weight to evidence deducible from inspection of the deed. But the lesson to be derived from such cases as these is a caution to avoid the risk of such doubtful questions.

DEEDS PARTLY
PRINTED AND
PARTLY WRIT-
TEN.

i. 138.

iv. 42, 3.

Ch. iii. 17, 18.

It is of importance to attend to the operation of the statutes which we have reviewed, with regard to deeds which are partly printed and partly written. Mr. Ross has objected strongly to the admission of any deeds not entirely in writing to the privileges conferred by the statutory solemnities. But Lord STAIR states expressly, that writ comprehends both *chirographum* and *typographum*, such writ being made probative by the acknowledgment in writing of the party ; in illustration of which he cites the authentication of St. Paul's Epistles, as in the second to the Thessalonians, " the salutation of me Paul " with my own hand, which is the sign in every Epistle ; so I write." Indeed, it does not appear that deeds partly printed are liable to any substantial objection, provided the requirements of the statutes are

observed in their completion. Printed bonds have long been in use in the Post-office, in the Excise, and Customs, and in other public offices; and the rapid extension of commerce and the multiplied channels of business are continually demanding increased facilities for the rapid completion of transactions—a purpose for which printed deeds, or such as are engraved or lithographed, are peculiarly fitted. Notwithstanding that the terms of the statutes applied only to written deeds, the use of printed bonds became legal by custom; and in the case of the *Creditors of Spot*, 30th November 1711, the Lords repelled the objection to a printed bond that it wanted the writer's name and designation, seeing that it did contain the designation of the party who filled up the blanks, these blanks being the debtor's name and designation with the date and witnesses. And in consistency with this decision, and in vindication of the statutory requisites as applied to such deeds, a printed bond was found null which did not contain the name and designation of the party who inserted in writing the sum, the creditor's name, the term of payment, and date and witnesses, the holder of the bond being, however, allowed to instruct by evidence, that these essentials were inserted by the debtor, the granter of the bond, himself, in which case it would have been entitled to the privileges of a holograph writing; *Allardice v. Forbes*, 25th Jan. 1710. M. 16868.

2.—*Upon what substance a Deed may be written.*—Sir EDWARD COKE in his Commentary upon Littleton says:—"If a writing be made upon a piece of wood, or upon a piece of linen, or in the bark of a tree, or on a stone, or the like, and the same be sealed and delivered, yet is it no deed; for a deed must be written either in parchment or paper;" . . . "for the writing upon these is least subject to alteration or corruption." BLACKSTONE, following this authority, holds that, if a deed "be written on stone, board, linen, leather, or the like, it is no deed." Mr. BYLES, a living English lawyer, in his Treatise on the Law of Bills of Exchange, conceives that bills and notes "might be written on parchment, cloth, leather, or any other substitute for paper capable of being transferred from hand to hand." This opinion may not appear altogether inconsistent with the other, if we advert to the limited period within which the purposes of a bill of exchange are accomplished, and the greater occasion for durability in a sealed deed. I am not aware that this question has engaged the attention of any writer upon the Law of Scotland. The Statute 1696, cap. 15, which we shall afterwards have occasion to refer to, as granting permission to write deeds on successive pages in the way now generally adopted, makes mention of paper, but cannot be held to prescribe that as the sole substance upon which deeds may be written; since, by long practice, the liberty which it UPON WHAT MAY DEED BE WRITTEN. § 370. P. 53.

PART I. confers has been extended to deeds engrossed upon parchment. The
CHAPTER II. Stamp-duty Acts, no doubt, interpose a practical difficulty in using any substance other than vellum, or parchment, or paper, which alone are provided by the Commissioners of Stamps. But there are deeds upon which no stamp-duty is imposed ; and it is not easy to discover any principle for holding that the intention of a party should not receive effect, if inscribed in due form of law upon any substance capable of preserving it entire and unvitiated. Circumstances may be conceived in which the legitimate purpose of a party might be defeated, if it is to be held that he cannot dispose of his property by writing, unless it be on paper or parchment. Some of you may remember a striking incident which occurred a few years ago, when many lives were lost, the parties having been immured in a coal-pit in the north of England. On reaching the sufferers, an iron plate was found beside the body of one of them, inscribed by him in the immediate prospect of death with a most affecting message of consolation to his surviving mother. Now, if in a similar form any writing of a testamentary nature had been found, I should be unwilling to believe that the law would disregard it ; nor does it appear that any legal principle would be violated, or dangerous precedent established, were effect given to such a deed, provided the means existed of fixing its authenticity.

STAMP ACTS. But, be this as it may, paper and parchment, or vellum, are the substances appropriated by universal practice to the writing of deeds ; and the first point to which we must look is, that, whichever of these is used, it be impressed, or stamped, with the proper amount of duty imposed by the Legislature upon the particular instrument which is to be written upon it. This is a matter of great importance in practice, and demands careful attention. It is impossible, however, within the limits of our time to enter into a detailed examination of the statutes relating to stamp-duties. These the practitioner must carefully study for himself ; and by obtaining a minute acquaintance with their provisions, he will be exempted from much after trouble and anxiety. I shall notice a few leading points.

Stamp-duties were first introduced into this country as a temporary war-tax by the Act 5 Will. and Mary, cap. 21. Afterwards, and gradually, such duties were permanently imposed upon various deeds at different periods. The principal Stamp Act is the 55 Geo. III., cap. 184, as modified by several posterior statutes, but chiefly by the 13 and 14 Vict., cap. 97. The duties now in force are contained in schedules subjoined to these statutes, to 16 & 17 Vict. cap. 59, 16 & 17 Vict., cap. 63, and also to the Act of 1854, 17 & 18 Vict., cap. 83. The schedules of these Acts are very comprehensive, and exhibit in alphabetical order the various deeds and instruments subject to duty, and the amount of duty payable for each. By the third sec-

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tion of the first of these Acts, these duties are placed under the care and management of the Commissioners of Stamps in Great Britain, who are required to provide for the issuing of vellum, parchment, and paper properly stamped; and by section eighth, the powers and provisions of former Acts are continued for levying and securing the duties by fines and penalties. It is very necessary to attend to the tenth clause of the same Act, which provides, that, where a stamp or stamps are used of an improper denomination or rate of duty, the instrument shall nevertheless be valid and effectual, provided the stamps thus improperly used are of equal or greater value than the stamp or stamps which ought regularly to have been used. It is to be carefully observed that, by the concluding part of the section, this provision does not apply to the case where the stamp used irregularly shall have been specially appropriated to any other instrument, by having the name of such other instrument on the face thereof. But by 17 & 18 Vict., cap. 83, § 10, the one penny stamps for receipts may be used for drafts, and those for drafts or orders may be used for receipts, notwithstanding their special appropriation.

We are first, then, to take care that, with the exception just noticed, the stamp is not one appropriated to a different instrument. And we are next to ascertain that the stamp denotes the amount of duty proper to the instrument to be written upon it. This will, in general, be found by examining the schedules. Some deeds require a stamp duty *ad valorem* according to the amount of the consideration or of the sum to which they refer; thus, a conveyance upon a sale is charged with duties graduated according to the price; and, in the same way, bonds for money lent, mortgages, bills, and promissory notes—of which the duty is also regulated, in part, by the distance of time at which they are payable—settlements, leases,* inventories of personal succession, indentures of apprenticeship, are all subject to *ad valorem* duties according to the pecuniary amount of the contract in every case. Other deeds, again, have a certain fixed duty—as agreements, bonds for the due execution of an office, and other bonds not charged in the schedule, powers of attorney, and others which you will find distinctly enumerated. By 16 and 17 Vict. cap. 59, receipts or discharges for money amounting to £2 or upwards are charged with a duty of one penny. A writing attesting the mere fact of the passing of money from one hand to another, when that money is not paid in the discharge of some preceding obligation, is not a receipt in the sense of the Stamp Acts, and does not require a stamp; *Macintosh* 14 D. 187. v. *Pitcairn*, 16th December 1851, and authorities there cited.† Therefore the receipt by an agent from his principal of money to be applied

* The duty upon leases having been imposed according to the yearly rent, new duties are, by 23d sect. of 17 & 18 Vict. cap. 83, made chargeable upon leases for less than a year.

† See note to p. 94.

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CHAP. II.

in furtherance of the mandate under which he is acting, does not require a stamp. With regard to such deeds as are not either charged with duty or exempted, these are comprehended in the general charge of deeds not otherwise charged, or expressly exempted. An important provision is made by the 14th section of 13 and 14 Vict. cap. 97, for determining cases of dubiety with respect to the proper stamp duty. Upon presenting the deed with a fee of ten shillings, the commissioners are required to assess the duty, and after a stamp has been affixed denoting the duty to which, in the judgment of the commissioners, the deed is liable, such deed is to be received in Courts of Law as duly stamped. If the applicant is dissatisfied with the opinion of the commissioners, he may obtain the judgment of the Court of Exchequer at Westminster, upon depositing 40s. to be repaid if the appeal is successful. Before thus assessing the duty, the commissioners may, by 17 and 18 Vict. cap. 83, sect. 17, require proof that the facts upon which the duty depends are correctly stated. By 16 and 17 Vict. cap. 59, sect. 13, when the commissioners are of opinion that an instrument is not chargeable with duty, they may impress it with a stamp denoting that it is not chargeable.

STAMP ACTS,
cont^d.

We are next to advert to the length of the deed, and to take care, if it contain more words than the schedule permits to be written upon one sheet, that it is extended to the proper number of sheets in continuation, and that these are impressed with the duty prescribed by the schedules in different cases for the additional sheets of deeds requiring more than one. Here it is very necessary to keep in view that every portion of a deed requiring to be stamped must be written upon stamped paper, and it is not sufficient that a stamp of large enough value for the whole deed appears upon a part of it, if there be any other part which is written upon unstamped paper. Thus, in *Nicol v. Fraser*, 11th March 1841, part of a lease had been written upon an unstamped half-sheet of paper, which had been substituted for the half of a sheet duly stamped, and it was found that the deed was not sufficiently stamped.

3 D. 890.

DEEDS EXEMPTED
FROM STAMP-
DUTY.

The deeds exempted from stamp duty are specified in the schedules under the titles of deeds of a similar nature. Those which it is most important to notice here are the following:—

Bank cheques payable to the bearer on demand, and issued within ten miles of the banker or person acting as a banker, on whom they are drawn.* These are expressly exempted from the duty of one penny imposed on letters of credit by 16 and 17 Vict. cap. 59. By 9 Geo. IV. cap. 49, § 15, the distance was increased to fifteen miles. Thus, while I live within fifteen miles of my banker, I may give orders upon him payable to the bearer, without stamps; but all orders issued at a greater distance must be written on

* See note to p. 94.

paper duly stamped. If a banker pay money upon unstamped orders, knowing that they were drawn at a distance beyond fifteen miles, or that they are wrong dated in point of time or place, he will not be allowed to recover the amount; *Swan v. Bank of Scotland*, 5th February 1835; reversed on appeal, 6th July 1835. By 17 & 18 Vict. cap. 83, § 7, no unstamped draft or order can be remitted or circulated beyond fifteen miles from the bank where it is payable, under a penalty of £50. But by § 8 any such draft, if lawfully issued unstamped, may, by affixing an adhesive stamp before it has gone beyond the assigned limit, be made negotiable beyond that distance.

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DEEDS EXEMPTED FROM STAMP-DUTY.
13 S. 403; 2 Sh. & M'L. App. 67.

Appraisements for legacy duty.

Agreement for a lease, the rent being under £5.

Agreement for hire of a labourer, artificer, manufacturer, menial servant, and of a mariner from port to port in Great Britain.

Indentures of poor children.

Indentures, bonds, contracts, and agreements made in the United Kingdom, as to service in British colonies of any artificer, servant, clerk, labourer, &c.—(17 & 18 Vict. cap. 83.)

Bonds of Friendly Societies.

Bond in confirmation of executor, the estate being under £20.

Extracts of protests for sums under 40s.

Commissions to General Assembly and other Church courts.

Leases of waste lands, where the rent is below a specified amount.

Insurances on agricultural produce, and of public hospitals, and of property in a foreign kingdom at amity with the Sovereign of this country.

Receipts for money deposited in banks.

Receipts on promissory notes, bills of exchange, and drafts or orders.

Letters acknowledging the safe arrival of bills of exchange, promissory notes, or other securities, were formerly exempted; but this exemption was repealed by the 13th section of 17 & 18 Vict. cap. 83.

Receipts or discharges indorsed or written upon a bond, mortgage, or other security duly stamped, acknowledging receipt of the sums, principal and interest, thereby secured.

Receipts for the duty upon fire insurance.

Receipts for money paid to the Crown; 17 & 18 Vict. cap. 83, § 14.

Public maps and certain other public documents are not stampable, though referred to in a deed or instrument; 17 & 18 Vict. cap. 83, § 22.

Wills, testaments, testamentary instruments, and dispositions *mortis causâ* of every description.

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By the Bankruptcy Act, 2 & 3 Vict. cap. 41, § 145, there is an exemption from stamp duties upon conveyances, sales, and proceedings under that statute, in so far as the payment of such duties would diminish the estate to the creditors, or to the bankrupt himself if reinvested.*

The duties imposed by the Act 55 Geo. III. are affected by subsequent statutes; in particular, by 7 & 8 Vict. cap. 21, reductions are made on sea insurances, agreements chargeable previously with a duty of £1 are reduced to 2s. 6d., and powers of attorney to vote in meetings of joint stock companies, of which the stock is divided into shares and transferable, are also reduced to a duty of 2s. 6d.

STAMP ACTS,
contd.

Duplicates or counterparts of deeds are, by 13 & 14 Vict. cap. 97, chargeable with reduced rates of stamp duty; and an omission in 16 & 17 Vict. cap. 63, to extend such reduced duty to deeds specified under the head "Conveyance," is supplied by the 15th section of 17 & 18 Vict. cap. 83.

By the 1 & 2 Vict. cap. 85, stamps denoting duties payable in one part of the United Kingdom may be used for instruments liable to stamp duties payable in any other part, provided the stamps so used are of equal or greater amount than those charged on such instruments, and provided also that no stamp specially appropriated by a mark on its face to one particular instrument shall be used for another.

Instruments made out of this country or at sea do not require to be stamped in terms of the Act 55 Geo. III., which directs the duties thereby granted to be levied "in and throughout the whole of "Great Britain." But here the duties imposed by 17 & 18 Vict. cap. 83 upon foreign bills must be kept in view. Our Courts will not regard the want of a stamp in a foreign deed, although a stamp may be requisite to such deed by the law of the country where it was made, because our Judges will not notice the revenue laws of another state. But it is different if the instrument has been made in a foreign country subject to the Sovereign of this realm, in which case it will be a good objection that it is not impressed with the duty payable where it was made.

It has been laid down as a general rule in the construction of the Stamp Acts by the English Judges, to whose opinion in such matters weight is attached in our Courts, that the cases in which duty is to

* By 6 Geo. IV. c. 41, § 1, bills of sale, conveyances, assignments, &c., for the sale or transfer, either absolutely or otherwise, of a ship, or share of a ship, are exempted from stamp-duty. A letter acknowledging the receipt of a sum as the price of shares of a ship is not a document falling under the above exemption. It is truly a receipt for money; and, if unstamped, it is not legal evidence of payment, and cannot be used as a declaration of trust; *Davidson v. Swanson*, 21st June 1854.

attach must be fairly and explicitly marked out by the terms of the statutes, and that a liberal construction is to be given to words of exemption.

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CHAPTER II.
STAMP ACTS,
contd.

It is well understood, that no single instrument which is liable to one specific duty is chargeable under any two or more heads or denominations. Thus a deed, containing both a personal bond and a disposition of lands in security of the amount, is chargeable only with the duty imposed upon a mortgage, and not with both a bond stamp and a mortgage stamp, although the schedule contains both of these denominations. But when the same deed is made for more than one valuable consideration, it is, by § 16 of 17 & 18 Vict. cap. 83, chargeable with stamp duty in respect of each. And if one deed contains more than one contract or instrument or transaction, there must be a distinct stamp for each of these. Thus three acts of infeftment under three separate warrants, though in favour of the same party, were held to require separate stamps; *Mackintosh v. Grant*, 12th May 9 S. 583. 1831. A deficiency in this respect cannot be supplied by annexing stamps on separate sheets.

Where an agreement is contained in various letters or other documents, and these serve to constitute the same agreement, one stamp is sufficient. And although there may be several subjects of contract, if they all manifestly form part of only one transaction, one stamp is sufficient. Thus you may have a personal bond for money secured both by a disposition of lands and an assignment of a life policy or other moveable property, and the mortgage stamp will cover them all. This is well illustrated by the case of *Brown v. Bedwell*, 3d 9 S. 136. December 1830, where a deed, containing a personal bond by a husband and an heritable security by his wife, was held liable only to a single *ad valorem* mortgage duty. But where a conveyance of land contained a bond for an annuity, it was held, in consequence of the provisions under the word "conveyance," to require both a conveyance stamp, and the stamp imposed upon the grant of an annuity; *Wilkie v. Flowerdew*, 5th March 1850. 12 D. 818.

Composition contracts, discharges by creditors, and relative deeds, though subscribed by many parties, are ruled by the same principle, and held to refer to one matter, viz. the estate for division, and so require only one stamp. It was so decided in the case of *Johnston & Co. v. Attwell*, 7th March 1801, with regard to an obligation granted by several parties to pay the debts owing to the six creditors of one person. M. v. "Writ," App. No. 5.

Where an instrument liable to stamp duty is not stamped, it is not admissible as evidence. This is expressly enacted by the 59th section of the 9th and 10th Will. III. cap. 25, which is continued by subsequent statutes, and is now in force. But an exception has been introduced by 17 and 18 Vict. cap. 83, § 27, which admits unstamped instruments in evidence in any criminal proceeding. In civil suits

NULLITIES
UNDER STAMP
ACTS.

PART I.

CHAPTER II.

STAMP ACTS,
contd.

5 Murray, 98.

the rule continues unaltered. The Court, therefore, cannot look at an unstamped instrument, further than to ascertain that it is liable to the objection. This was exemplified in the case of *Cadzow v. Wilson*, 4th January 1830, where an unstamped missive of sale was not admitted as evidence, even although the objection to it was not insisted in by the party against whom it was adduced. No consent of parties can cure a defect by which the public revenue suffers. The same enactment, however, provides the remedy, that the instrument may be admitted upon payment of the duty and of a penalty, and upon the instrument being stamped with a lawful stamp. The power of getting deeds stamped after execution is facilitated by § 12 of the Statute 13 and 14 Vict. cap. 97, the commissioners being authorized to remit the whole or a part of the penalty upon the deed being presented to be stamped within twelve months, where the execution without a stamp has proceeded from accident, mistake, inadvertency, or urgent necessity, and without wilful design to defraud the revenue; and by § 13, deeds executed abroad may be stamped, without a penalty, within two months from their being received in this country.* There are certain instruments, however, to which the remedy is not available. By the 23 Geo. III. cap. 49, § 14, bills of exchange, promissory-notes, and receipts or discharges, are declared inadmissible as evidence, unless properly stamped before being written; and this is still in force with this modification, that, by 35 Geo. III. cap. 55, § 11, receipts and discharges may be stamped within a fortnight upon payment of the duty and a penalty of £5, and within a month upon payment of the duty and £10; and, by the 37 Geo. III. cap. 136, § 5, bills and notes written upon stamps of sufficient value but of a wrong denomination may be stamped correctly, upon payment of the duty and a penalty. It has been already noticed that, by 17 & 18 Vict. cap. 83, § 10, the penny stamps for receipts may be used for drafts, and the penny stamps for drafts for receipts, notwithstanding the special appropriation. But there is no remedy for a bill or note written upon a stamp of a wrong denomination and of too small value; and, with these explanations, it is certain that a bill, promissory-note, or receipt, written upon paper unstamped or stamped with too low a duty, is incurably defective, and not admissible as evidence. This is strongly illustrated in the case of *Greenock Bank v. Darroch*, 12th December 1834, where a party admitted his signature as drawer and indorser of a bill of exchange written upon an insufficient stamp; and yet, the Court being forced by the Stamp Acts to lay the bill out of view, he was held not liable for the amount, unless the holder could prove the debt by other evidence than the bill. But, although unavailing to prove the *payment* to which it refers, an unstamped receipt may be used for what is called a collateral purpose, *e.g.*, an unstamped receipt

See *supra*, p. 85.

13 S. 190.

* See p. 93, and note.

for rent, though it cannot be used to prove the payment, may be adduced to prove the fact of tenancy. Upon this principle, in *Matheson & Son v. Ross*, 27th March 1849, an unstamped receipt was admitted to prove a state of accounts written upon it, that state of accounts not being dependent upon proof of the payment.* The same is the case with respect to policies of sea insurance, which are absolutely null, if not stamped when written; and the Commissioners are forbidden to stamp them by the 15th section of 35 Geo. III. cap. 63. The duties on sea insurances in the general Act 55 Geo. III. are repealed, and others imposed by the 3 & 4 Will. IV. cap. 23.

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6 Bell's App.
374.

Indentures of apprenticeship are absolutely void, if the consideration be not truly set forth in them; and also, though otherwise unexceptionable, they are absolutely void, if not duly stamped within three months, when executed within fifty miles from the limits of the weekly bills of mortality, and, when at a greater distance, within six months. The duty on indentures is reduced by 16 & 17 Vict. cap. 59.

With these exceptions, deeds may be stamped, on payment of a penalty, at any time; and where a deed is deficient in this respect, the Court, if craved in due time, will sist process, to afford time for getting it stamped. It is needless to refer to the numerous cases in which this has been done. In *Church v. Sharpe*, 8th March 1843, a party was allowed to get a minute of lease stamped, after having at an early stage of the litigation declined to avail himself of the power so to validate the document. Even after a deed has been placed upon record, the Court will grant warrant to transmit it to the Stamp Office to be stamped, on security being found to return it to the register; *Laidlaw*, 21st January 1840. With regard to the expense of stamping, the Court imposed that burden upon the granter of the obligation, in *Gardiner's Executrix v. Bennett*, 28th November 1839, on the ground that implement ought to have been given without rendering any action necessary, and that he ought to have given a valid obligation at first. But it is important to observe that where the granter becomes bankrupt, this expense will fall upon the receiver of the unstamped document; *Law v. M'Laren*, 20th July 1849; here it was observed on the Bench, that the policy of the law requires the Court to check the practice of using unstamped documents. The expense of stamping a mutual deed founded on by both parties was imposed equally upon them, in *Logan v. Ellice*, 6th March 1850.† The expediency of using stamped

AFTER-STAMP-
ING.

5 D. 876.

15 F. C. 356.

2 D. 155.

11 D. 1489.

12 D. 841.

* In *Bannatyne v. Wilson*, 13th December 1855, an account containing entries of money as paid, was, although unstamped, allowed to be produced as evidence, not of the payment of the sums of money, but of the state of the balance as between the parties at the date at which it was rendered. 18 D. 230.

† A gratuitous assignation, unstamped, was produced in a litigation as a title by a party who, on the want of stamp being stated as an objection, had it stamped. It was held that, though the party producing such a document as his title prevailed in the litigation, and was found entitled to expenses generally, yet he was bound to put himself *in titulo* to use it,

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13 D. 827;
aff'd. on appeal,
29th March
1852.

LEGAL EFFECT
OF AFTER-
STAMPING
DEEDS.

9 S. 583.

Vol. i. p. 739,
4th footnote.

Elchies v.
"Writ," No. 14.

M. 5494.

1 D. 10.

1 D. 14.

6 D. 97.

AFTER-STAMP-
ING consid.

17 D. 353.

9 D. 1502.

10 D. 306.

documents is strikingly shewn in *Hutchinson v. Ferrier*, 4th March 1851, where a lease having been annually renewed by missives, it was held that it could only be proved by production of these, and that they were inadmissible as evidence, if not stamped.

With regard to the legal effect of stamping deeds after their date, different views have been taken. In the case of *Mackintosh v. Grant*, 12th May 1831, to which we have already referred, it appears to have been held that, a sasine having been inadequately stamped when presented to a court of freeholders in support of a claim of enrolment, the judgment of that court rejecting the claim could not have been affected by the subsequent stamping of the deed. On the other hand, Mr. Bell, in his Commentaries on the Law of Scotland, has preserved a brief notice of an election case, in which it was held that a title to vote, which at the time of enrolment was defective from sasine having been taken on a disposition having a wrong stamp, was rendered unexceptionable by the subsequent affixing of the proper stamp. The date of this case is 16th February 1819, but the name is not given. The general tenor of the decisions is to make deeds, after the stamp is affixed, operate *retro* in the same way as if they had been duly stamped when executed. Thus, in the case of *Creditors of Kingstorie*, 12th January 1743, diligence by inhibition and adjudication having been found null on account of the title being unstamped, the party got it stamped, and the Lords held that the stamping operated backwards so as to support the diligence. In *Lamont v. Lamont's Creditors*, 4th December 1789, the subsequent stamping of a *mortis causa* deed was held to validate decrees of constitution and adjudication obtained while it was unstamped. In *Davidson v. Gibb*, 13th November 1838, after-stamping was found to validate *ab initio* a process of maills and duties; and in *Wood v. Ker*, a case of the same date as the last, the same decision was pronounced with respect to a process of poinding the ground. Again, in *Mories v. Glen*, 24th November 1843, a vote given for the trustee in a sequestration by a creditor, whose ground of debt was objectionable for want of a stamp, was held to be validated by the after-stamping.

But while in these cases the remedy has been equal to the defect, every careful Conveyancer will not the less consider it the part equally of prudence and of duty to have his deeds put upon proper stamps when executed. In the case last cited you will find that the judges carefully reserved their opinions with respect to the legal effect of

and could not recover the expense of stamping; *Macpherson v. Macpherson*, 7th February 1855. One of the judges put his acquiescence in the decision, upon the ground that the deed was not a mutual contract. In the case of *Smail v. Potts*, 16th July 1847, the expense of stamping a mutual contract, which was at a jury trial used by the pursuer, to whom expenses were found due, was laid equally upon both pursuer and defender, upon the ground that the contract was a mutual one. The same was also found in *Flowers v. Graydon*, 18th December 1847.

after-stamping in other cases than the one then before them ; and there is this serious risk in the case of an unstamped deed, that if it should happen to be lost, the tenor of it cannot be proved. This has been found in England ; and, although the point has not actually occurred in our Courts, it appears to be certain upon principle, that a judge could not receive evidence of the tenor or contents of a deed open to an exception which would prevent his looking at the deed itself if produced.*

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Cases cited by
Bell, Comm. i.
322.

The nullity of bills of exchange and promissory-notes written upon paper either not stamped at all, or inadequately stamped, suggests a very important caution in a department of business in which serious errors will naturally occur, if not guarded against. In granting acknowledgments for money upon unstamped paper, it will happen that something is said as to the repayment, but it will be fatal to the validity of the document, even as an acknowledgment, if any words are used, which are in their form equivalent to a *promise to repay*, as it will be held to be a promissory-note, and incapable, therefore, of receiving the stamp after being written. Thus in *M'Intosh v. Stewart*, 8 S. 739. 13th May 1830, an acknowledgment of money, with the addition, "which sum I promise to pay," was held to be a promissory-note, and void for want of a stamp. The same decision had been given in *Alexander v. Alexander*, 26th February 1830, where the document 8 S. 602. was a holograph letter in these terms :—"I acknowledge to have this day received from you Eighty Pounds sterling, which I shall pay when required." This was held to be a promissory-note. See further *Scott v. Scott*, 19th February 1835. 13 S. 490.

But an acknowledgment of money received, with an engagement to repay in the form not of a promise but of an *obligation*, is held to be of the nature of a bond, and therefore stampable ; *Martin v. Brash*, 25th June 1833 ; *Jones v. Farquharson*, 4th December 1834. 11 S. 782. 13 S. 117. In these two cases, the words "oblige to pay" or "to repay," were used. In *Pirie's Representatives v. Smith's Executrix*, 28th February 1833, there were four acknowledgments of money received, containing in the two first the words, "for which I shall account," and in the other two the words, "which I shall repay you when demanded." The Court, after consultation of the whole Judges, held that the two former documents were neither receipts nor promissory-notes, and therefore stampable, and that the two latter were promissory-notes, and so incapable of being stamped.

In England there is in familiar use an abbreviated form of an acknowledgment of money owing, called an I. O. U. The document

UNSTAMPED
ACKNOWLEDG-
MENTS OF DEBT. .

* *Agreements* (2s. 6d. duty) and *charter-parties*, may be stamped within fourteen days, without penalty ; 7 & 8 Vict. c. 21 ; 5 & 6 Vict. c. 79. An *attested copy* may be likewise stamped, without penalty, within sixty days of date of attestation ; 39 & 40 Geo. III. c. 84. As to the after-stamping of deeds executed abroad, see 13 & 14 Vict. c. 97, § 13.

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16 D. 612.

contains simply the date, the three capital letters I. O. U., the amount, and the debtor's signature, with or without the creditor's address. Such acknowledgments receive legal effect, and are held exempt from stamp duty, as being neither receipts nor promissory-notes. In Scotland we have on this point the authority of *Macpherson v. Munro*, 18th February 1854, recognising an I. O. U. as an acknowledgment of debt. There the I. O. U. was attached to a letter, which contained a stipulation that, though the acknowledgment was sent to the creditor, he must "wait in the meantime." It was held, that the stipulation did not import into the acknowledgment a condition of postponed payment, so as to convert it into an agreement, and to render a stamp necessary before it could be received in evidence of the alleged debt. Written acknowledgments of money—advanced by a party not a banker, but accommodating another from time to time with cash to pay his workmen, as there was no banker in the neighbourhood—were held free from liability to stamp duty, in *Sloan v. Birtwhistle*, 1st June 1827.*

5 S. 742.

NO ALTERA-
TION CAN BE
MADE UPON
INSTRUMENTS
AFTER ISSUE.

14 S. 898.

It is an established principle that, after an instrument has been completed, and issued or made an available security, no material addition or alteration can be made upon it without an infringement of the Stamp Acts. Bills having been issued as completed instruments, two new obligants were added to them, and on this ground they were declared null and void; *Home v. Purves*, 7th June 1836. In this case you will also find the doctrine illustrated, that it is *pars judicis* to enforce this objection, and that this may be done at the most advanced stage of the litigation.

STAMP ACTS,
CONS^d.

Although the want of a stamp nullifies a deed which is by law subjected to stamp duty, that circumstance does not destroy the right of the party, even where the defect cannot be cured by stamping, unless the deed contained the only evidence of the right. If it can

* A firm of law-agents, who were the petitioning creditors in a sequestration, produced as their ground of debt an account-current, containing entries for cash advances made by them in the character of factors and cashiers. They also produced as the vouchers of these advances unstamped drafts upon them by their client, the debtor, in the following form:—"Debit my account with £20." The question was raised, but not decided, whether these vouchers required stamps, or whether they were entitled to the privileges of bankers' cheques. Lord FULLERTON observed:—"These orders are truly receipts for money, and as such, I think, require a stamp. The respondents are not bankers; and I do not see how a person, who has a sum of money deposited in the hands of another, can be allowed to get the better of the stamp-laws by granting receipts for it in this way. I do not think these documents can be looked upon as I. O. U.s. They are writings which rather seem to fall under the stamp-laws." On the other hand, Lord CUNTINGHAM remarked:—"I do not think the cheques required stamps; and I am not ready to find, that if a party sends a letter to another who owes him money, saying, 'I will thank you to give the bearer £20,' that would require a stamp. No doubt, bankers' cheques are excepted in the schedule of the Stamp Act, but that does not decide that every other order for money must be stamped;" *Elder v. Thomson, Elder, and Burn*, 12th June 1850.

12 D. 994.

be established by other competent evidence, the right will receive effect notwithstanding that the writing is null.

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I have thus directed attention to the most important points in practice connected with the stamp-duties. But, as already stated, it is impossible to discuss that subject in detail within the limits necessarily assigned to these Lectures; and the observations which have been made must be regarded rather as hints and directions for acquiring a fuller acquaintance with this subject, than as designed to furnish such information directly.

The next point which we are to consider is—

3. *The external form of Deeds.*—The first thing to be remarked here is, that the 1 Anne, Stat. 2, cap. 22, requires all writings, mat- 1 Anne, S. 2, ters, and things, on which stamp-duties are payable, to “be written c. 22. “in such manner that some part thereof shall be either upon, or as “near as conveniently may be to, the stamps,” under a penalty of £10. This regulation ought to be attended to, being still in force under the clause of the general Stamp Act, which continues in effect the provisions and penalties of previous statutes. In discharges the one penny adhesive stamp must, by § 4 of 16 & 17 Vict., cap. 59, be cancelled by writing the name or initials over it, under a penalty of £10. The same rule is, by the Act of 1854, extended to orders and drafts.

Formerly the practice was to preserve executed deeds in the form of rolls, in the same manner as the books of the ancients were rolled up, and which form gave the name *volumen* to a book. This practice prevailed in all legal proceedings, and judicial records were called the Rolls of Court; and our Lord Register, who is the official custodier of these records, is designated Clerk of Her Majesty’s Council and Rolla. When one sheet of paper was not sufficient, it was lengthened DEEDS IN FORM OF ROLLS. by pasting another upon its lower end, to which, if necessary, a third was added, and so on. The signature being at the bottom of the deed, it was evidently sufficient only to authenticate that sheet upon which it was written; and it therefore became common not only to subscribe, but to sign along the side at the joinings, the Christian name being written on one sheet, and the surname upon the other. This practice, however, although common, never became so universal as to obtain the force of a legal solemnity; and so in the case of *Ogilvie v. Earl of Finlator*, 14th January 1674, a bond was sustained against a cautioner’s representative, although not signed at the joining of the sheets; and in *Sym and Scot v. Donaldson*, 23d November 1708, a deed challenged, on the ground that it was not sidescribed at the juncture of the sheets, was sustained, in respect the last sheet, which was subscribed, contained the essential parts of the deed. Thus SIDESCRIBING. M. 16804. M. 16713.

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DEEDS WRITTEN
BOOKWISE.

the Court determined every case according to its own peculiar circumstances.

The method of writing long deeds in the form referred to, and preserving them as rolls, was attended with inconvenience ; and similar inconvenience was experienced in the ancient practice of writing charters and sasines of great length upon large single sheets of parchment. This led to various enactments, of which the first was the Act 1672, cap. 7, which refers to the class of writs passing the Great and Privy Seals, and empowers parties to choose whether they will have their charter or other writ in a broad skin of parchment as formerly, or to have them written by way of a book in leaves of parchment ; and in the latter case it directs how the pages are to be marked, and the seals appended. The next statute was that of 1686, cap. 17, which authorised the writing of sasines by way of book.* The last statute upon this subject, and by which deeds in general are regulated in this particular, is the Act 1696, cap. 15, which allows an option to parties to choose whether they will have their securities written on sheets battered together as formerly, "or to have them written by way of books " in leafs of paper, either in folio or in quarto, providing that, if they " be written bookways, every page be marked by the number first, " second, &c., and signed as the margins were before ; and that the " end of the last page make mention how many pages are therein " contained, on which page only witnesses are to sign in writs and " securities, where witnesses are required by law." Deeds so written, marked, and signed, are declared "to be as valid and formal as if " they were written on several sheets battered together, and signed " on the margin, according to the present custom."

By the terms of this statute, it will be observed that the writing of deeds bookwise is permissive, and not obligatory ; and the power of writing them as formerly upon one page formed of two or more sheets pasted together, is not only not abrogated, but that method is expressly recognised as valid and formal ; and whereas it previously rested merely upon custom, sidescribing was after, and by virtue of, this Act held to be essential in deeds of that form. Accordingly, a disposition of land was found null, because "not sidescribed on the " joining of the sheets, after the Act of Parliament establishing the " custom of sidescribing the joinings ;" *M'Donald v. M'Donald*, 18th December 1714. This form, although inconvenient for reference, possesses peculiar conveniences in the case of instruments executed by a large number of parties, whose subscription of every page, as required when the deed is written bookwise, would be troublesome and difficult, if not impossible. The practice of writing deeds on one extended page has, accordingly, been much revived of late years in the case particularly of joint-stock companies, consisting of numerous

* See *infra*, note to p. 98.

partners. Modern improvements in the art of paper-making enable the practitioner to obtain a single sheet of any length he may require ; and the increased risk of injury by friction or tearing, where the sheet is large, is obviated in practice by having it pasted upon cloth. When parchment is used, the deed can be lengthened only by adding sheets ; and, as there would be great difficulty in having the joinings signed by every member of a numerous copartnery, there is usually inserted in the body of the deed an authority to one or two individuals to sign the joinings. This mode of execution was sustained in the case of *Sclater v. Clyne*, 11th January 1831. The judgment in this case was reversed upon appeal to the House of Lords ; but this particular part of the decision was not brought under review.

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When, according to the permission of the Act 1696, cap. 15, the deed is written bookwise,—and this is the common practice,—the first requirement is, that every page be marked by the numbers *first*, *second*, &c. These numbers are expressed in words in the Act, and it is the practice to number the pages in words. It has been decided, however, (though the soundness of the decision is questionable,) to be no objection to a deed that the pages are numbered with arithmetical figures instead of words ; *Earl of Cassillis' Trustees v. Kennedy*, 9 S. 663. 2d June 1831.* The other requisite by the statute is, that every page shall be signed, and that the number of pages be mentioned in the last page. By a long and uniform train of decisions it is established, that both of these requirements are indispensable only in deeds of more than one sheet ; and that where a deed is contained entirely upon one sheet of paper, it is not necessary, although it be written on successive pages, to sign more than the last page, or to insert the number of pages. These decisions are founded upon the principle, which derives reasonable countenance from the terms of the statute, that the Act refers only to deeds written upon more than one sheet. See as to the sufficiency of subscription upon the last page, where the deed consisted of only one sheet ; *Williamson v. Williamson*, 21st M. 16955. December 1742 ; *Smith v. Bank of Scotland*, 4th July 1816 ; and F. C. as to inserting the number of pages, *Robertson v. Ker*, 7th January M. 16955.

REQUISITES OF
DEEDS WRITTEN
BOOKWISE.
—
NUMBERING
PAGES.
—
SIGNING AND
MENTIONING
NUMBER OF
PAGES.

* In *Thomson v. M'Crummen's Trustees*, 1st February 1856, a bond and disposition in security was challenged, upon the ground that, though written upon more than one sheet, the pages were not numbered. The Court pronounced decree of reduction, in respect that the deed had not been executed bookwise in the manner provided by the statute in order to render deeds executed in that form valid and effectual ; and, therefore, that it was not authenticated and probative by the Law of Scotland. A judgment to the contrary effect, finding that none of the requirements of the Statute 1696 are to be regarded as solemnities, had been pronounced by Lord ROBERTSON in the Outer-House, in the case of *Hogg v. Nobell*, 23 Jurist, 488. 7th December 1850 ; and a similar opinion had been previously expressed by Lord IVORY in *Smith v. North British Insurance Company*, (*infra*.) It is understood that *Thomson's* 12 D. 1132. case is to be appealed to the House of Lords. *Vide infra*, p. 99, note.

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M. 16956; and
2 Hailes, 789.

1742; *Macdonald v. Macdonald*, 14th February 1778. In deeds of more than one sheet, the compliance with the Act in specifying the number of pages in the testing clause has been so universal, that there has been little or no opportunity of making that point a subject of judicial discussion. There is a case reported by Lord MONBODDO, where a marriage-contract was challenged on the ground that, although it was written upon several sheets, the number of pages was not mentioned; and it was, notwithstanding, sustained upon the grounds, *first*, That it was a marriage-contract, and, therefore, more favoured than another deed; *secondly*, That the pages were numbered; and, *lastly*, That there was a catchword at the bottom of each page, so that it was impossible anything could be foisted in; *Porteous v. Bell*, 4th February 1757.* The statute was held to be sufficiently complied with, where, although there was no mention of pages, the deed stated that it was written upon three sheets, and that the eleven first sides were signed by the granter, and the twelfth by the granter and witnesses; *Henderson v. Wilson, &c.*, 31st January 1797.† In *Dickson v. Cuninghame*, 3d March 1829, a sasine was sustained, although stated in the notary's docquet to consist of nine pages, the real number being eight. This was held a mere graphical or clerical error, the nature of which was obvious *ex facie* of the instrument.‡

5 Br. Supp. 855.

M. 15444.

7 S. 516.

4 S. 335.

* It seems *per se* sufficient to justify this decision, that there was here a marriage-contract which had been acted on. Lord GLENLEE, in the case of the *Earl of Fife v. Duff*, 22d December 1825, after giving his opinion that the defect alleged was such that the deed could bear no faith, observed, that it was "a very different question, when a great deal has been done by the parties on the faith of the deed, whether benefit can be taken of the nullity, or re-duction be allowed. No nullity arising from defect of solemnity can be greater than that from the want of subscription of the party. Yet disability to bear faith on this ground may be removed by homologation, as in the case of a contract of marriage, unsubscribed by one of the parties, but followed by marriage."

† "I cannot say that the case of *Henderson* is satisfactorily reported, and certainly it cannot be taken as a ruling case to which our view of the statute must bend." *Per* Lord Justice-Clerk (HOPE) in *Thomson v. M'Crummen's Trustees*, *supra*.

1686, cap. 17.

‡ *Dickson's* case referred to an instrument of sasine. The Statute 1686, cap. 17, (see *supra*, p. 96,) enacted:—"That it shall be lawful for parties, if they think fit, to cause write and extend their sasines by way of book, the attestation of the nottar condescending upon the number of the leaves of the book, and each leaf being signed by the nottar and witnesses." In *Duke of Roxburghe v. Hall*, 1741, the Court at first sustained it as a nullity under this statute, that the attestation of the notary did not condescend upon the number of the leaves of the sasine. But the objection was afterwards repelled both in that case and in the case of *Clark and Wardel*, 7th February 1752, in respect it appeared on inquiry, "that there were more sasines that laboured under the same defect, than there were sasines in terms of the statute; and of the danger that might ensue by annulling the sasines for a defect which in practice had been so general." The Court further declared, that they would make an Act of Sederunt, reviving and enforcing the statute. They, accordingly, did

A. S. 17 Jan.
1756.

Inst. iii. 2, 16.

make an Act of Sederunt, 17th January 1756; which Act, instead of proceeding upon the Statute 1686, cap. 17, which applies exclusively to sasines, proceeded upon the Statute 1696, cap. 15, which, as EUSKINE observes, has no application to sasines at all. By this Act of Sederunt the Lords "hereby appoint the regulation, contained in the foresaid Act of Parlia-

The same principle was applied in sustaining a bond, which bore to be written on this and the ten preceding pages, while it consisted only of ten pages in all; *Smith v. North British Insurance Company*, 28th June 1850.* It appears thus to be settled, that a mere innocent clerical error in this particular will not nullify a deed, provided the evidence on the face of the deed be clear, that it is such a mistake.

The Act 1696, cap. 15, by its terms gives effect to deeds written bookwise, only on condition of compliance with the provisions it contains; and the form of that statute, therefore, would appear to imply the nullity of a deed on more than one sheet which does not state the number of pages.† The decisions now cited, however, seem to have very much deprived the observances enjoined by that Act of the character of indispensable solemnities, by admitting other evidence to countervail them in proving the identity or verity of the deed. Still the judgments in the case of *Cassillis*, (*supra*), and also in the parallel

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12 D. 1132.

DEEDS WRIT-
TEN BOOKWISE,
contd.

§. 663.

"ment 1696, to be punctually observed in all time coming; and that every instrument of sasine, written bookwise, shall have every page marked by the number *first, second, third*, &c.; and that the notary's docquet subjoined to the sasine, shall mention the number of pages of which the sasine consists: With certification that all sasines to be taken after the said 12th day of June 1756, contrary to the directions of the foresaid Act of Parliament 1696, and of this Act, shall be null and void," &c. This Act of Sederunt, therefore, assumes the requisites prescribed by 1696, cap. 15, to be imperative as solemnities. The error in *Dickson's* case was proved to be a merely clerical one by this, that each of the pages was numbered, and in his docquet the notary attested that there was an erasure in the seventeenth line of the *eightth* page, being the page upon which the docquet was written. The word "*octo*" in that docquet was treated, therefore, as simply a clerical mistake for "*septem*."

* In this case it was observed, that there was there no occasion for asking whether the Statute 1696 created a nullity or not. Lord MONCREIFF remarked:—"The *bona fide* reading of it is, that it will operate as a nullity. But I think that there is here an unimportant mistake, and that our decision will not in the least degree touch upon the statute."—22 *Jurist*, 512.

† In the case of *Thomson v. M'Crummen's Trustees*, (*supra*, p. 97, note,) the defenders argued in support of the validity of the deed—1. That the Statute 1696 contained no sanction of nullity,—a sanction which could never arise by mere implication, but required direct words. 2. That the object of the statute was not to introduce any new safeguard or protection in the solemnities of deeds, but merely to remedy an inconvenience. 3. That *sidescribing* had been mere matter of evidence, not of solemnity; and, therefore, that it could not be presumed that the requisites substituted for *sidescribing* were intended to be matters of solemnity. The Court, however, in pronouncing decree of reduction, proceeded upon the ground that, where a particular mode of executing an instrument is allowed by statute, no deed, not in the form stated, can be sustained as validly executed—that it is plain, from the terms of the statute, that instruments, written bookways, are only to be allowed and sustained, *providing* that certain things appear on the face of them—these not appearing, the instruments are not authorized to be substituted in place of the former forms and older mode of execution—that the result of any other view would inevitably be, that every one of the forms contained within the proviso of the Act might be disregarded, and an instrument in any form be introduced into the law. It was also laid down, that it is not necessary, in order to attach the sanction of nullity to the non-observance of statutory requisites, that such nullity shall, in express terms, be declared to follow from such omission.

PART I.
CHAPTER II.
6 S. 931.

case of *Gaywood v. M'Eand*, 19th June 1828, imply, that if the number of pages, which, in each of the deeds referred to in these cases, was partly written upon an erasure, had been wholly vitiated, the objection would have been fatal.* This, no doubt, might result not from a statutory nullity, but from the general principle which attaches suspicion to deeds vitiated in material parts; but, whatever may be the ground of the doctrine, it is sufficient for the Conveyancer to know that the number of pages ought to be stated in an unequivocal manner, and that the absence of that information will expose the deed to challenge; and, although this statutory requirement is dispensed with in deeds which do not exceed four pages in length, and are written upon one sheet, the correct and all but universal practice is to insert the number of pages in these also.

The next point which demands our attention is

SUBSCRIPTION
AND SUPER-
SCRIPTION.
iv. 42, 3.

MODE OF SUB-
SCRIPTION.

4. *The subscription of the party.* This, as we have already seen, was rendered necessary to the validity of a deed by the Act 1540, cap. 117. Subscription is the mode of authentication proper to a subject. The Sovereign signs, not at the end, but at the beginning of a deed; and the reason, as given by Stair, why Kings and Queens superscribe, is, that they have not time to peruse the body of the writing, in which there is much of formality. Subjects subscribe in different ways, according to their rank. A peer subscribes simply by his title, and where he possesses more than one title, he signs generally by the highest alone, adding inferior titles when there is special cause connected with the subject of the deed. Temporal peers do not prefix their Christian names to their title: their wives subscribe by their Christian name prefixed to the title of nobility; and peeresses in their own right usually subscribe in the same manner as wives of peers. The eldest sons of peers above the rank of viscount are usually called by one of the inferior titles of the family, and they subscribe by that title—a practice which has been made valid by invariable usage, although not expressly authorized by the statute upon the subject, which we shall presently have occasion to quote.

Subscription is the mode of authenticating judicial sentences. By 1686, cap. 3—"All interloquitors, pronounced by the Lords of Council and Session and all other Judges within the kingdom, shall be signed by the President of the Court, or the Judge-pronouncer

* In the latter case, Lord GILLIES observed:—"I admit that the word twelve is essential, but then there is no erasure of the word. There is, no doubt, a blotting of the letters 've,' plainly for the purpose of correcting the spelling; so that the question is, whether these letters be essential. I think not, because the word would sufficiently express, even without them, the number of pages, which is all that is necessary." In these remarks "the other Judges concurred."

“thereof;” and the clerks are prohibited from extracting decrees unless the interlocutors are so signed, extracts of interlocutors not duly signed being declared null and void. By usage this statute does not apply to presbyteries. If it did apply, subscription on the day of pronouncing the sentence is not necessary; and the judgment is sufficient if signed *ex intervallo* by any member of Court deputed to sign, being Moderator when signing was ordered, and present at pronouncing the sentence; *Fergusson v. Skirving, &c.*, 28th May 1852. PART I.
CHAPTER II.

12 D. 1145;
1 Macq. App.
232.

Although, in the year 1540, writing had become more common than it was at an earlier date, the practice of subscription did not become universal immediately after the statute of that year was passed; and there was variety in the form of it, occasioned partly by religious associations, which led to signature by a monogram containing the letters of a party's name combined with those of a tutelary saint, and partly by the unsettled practice which still prevailed with respect to the use of surnames. These, according to some, arose in the eleventh century, and Buchanan is of opinion that we borrowed surnames from the French, and that their original source was some distinguishing mark connected with the person of the individual. In Scotland, however, proprietors, from an early period, took their surnames from their lands; and, as there was no hindrance to the assumption of such names as suited a party's fancy, until near the end of the seventeenth century, great latitude prevailed in the form of subscription. Intercourse with the French naturally led to an imitation of their practice, which was to sign the surname without prefixing the Christian name; while others subscribed deeds by the name of their lands, altering their subscription when they changed their property. The Statute 1672, cap. 21, was passed with the view partly of correcting these uncertainties. It is an Act concerning the privileges of the office of Lyon King at Arms; and in one of its clauses it declares, “that it is only allowed for noblemen and bishops to subscribe by their titles; and that all others shall subscribe their Christianed names, or the initial letter thereof, with their surnames; and “may, if they please, adject the designations of their lands, prefixing “the word or to the said designations.” The proper practice, then, as introduced and established by this Act, as regards private individuals, is, to subscribe by their Christian name, or the initial letter (or, in conformity with practice, an abbreviation) thereof, and the surname. A deed was, however, sustained which was subscribed simply, “Ful-larton of that Ilk,” without the party's Christian name, upon the ground that the Act attaches no nullity to deeds not subscribed in conformity with its terms, but makes the offenders punishable by the Privy Council; *Gordon v. Murray*, 21st June 1765. It is scarcely necessary to remark, that the signature must be written by the party

ACT 1672, CAP
21, REGULATING
MODE OF SIGNA
TURE.

M. 16818

PART I.

CHAPTER II.

M. 16906.

PARTY'S HAND
MUST NOT BE
LED.

1555, cap. 29.

himself. Such a doctrine scarcely needs the confirmation of a decision; but, in *Stewart v. Stewart*, June 1779, you will find it decided, that one witness cannot sign for another, any more than one party can sign for another.

By the Act 1555, cap. 29, it was directed, that in certain writs, if the party could not subscribe, he should, notwithstanding, "subscribe the samin with his hande at the pen led be ane authentick notar." This is a practice now, however, entirely exploded. Where the party cannot subscribe, the subscription is to be made by notaries at his request, and by his warrant. When the party can write his name, he must himself subscribe, and his subscription must be free and spontaneous, the law being jealous of all extraordinary aid. The hand of the party, therefore, must not be led, nor his subscription traced upon the deed for his guidance; and such interference or aid will be fatal to its validity. In the following cases deeds were reduced, because the granter's hand was led in signing: *Falconer v. Arbuthnot*, 9th January 1751; *Ballingall v. Robertson*, 22d May 1806; *Harkness v. Harkness*, 14th September 1821; and a settlement of land was reduced, upon evidence that the granter had written his signature upon marks previously traced by another with a pin or wire, he having been wont to sign by initials; *Crosbie and Pickens v. Picken*, 30th November 1749. Baron HUME reports a case, in which the party, being unwell, doubted whether she could write her name, though previously accustomed to do so; and the writer of the deed having written her name on a slip of paper, she first wrote it herself on the slip of paper, and then subscribed the deed with the separate writing held before her. An objection founded on this was repelled, and the deed sustained, chiefly on the ground that the granter had been accustomed to write her name; *Wilson v. Raeburn*, 28th May 1800. A comparison of these two cases shews, that in such circumstances the question of the party's ability to write forms an important element. In the case of *Wilson* the party could write, while in that of *Crosbie* he could not, although he had been accustomed to sign by initials; and the latter case, therefore, did not afford the means of testing the genuineness of the subscription *comparations literarum*. The subscription must be complete, and the writ will not be supported if a part only of the granter's name is subscribed. In *Moncrieff v. Monypenny*, 15th July 1710, the party wrote his Christian name and the first syllable of his surname, which through weakness he was unable to complete, and the remainder was written with his hand led. The Lords reduced the deed, and their judgment was affirmed on appeal.

M. 16817.

Hume, 916.

2 Murray, 558.

M. 16814.

Hume, 912.

SIGNATURE
MUST BE COM-
PLETE.
M. 15936.EVERY PAGE
SHOULD BE
SIGNED.
M. 16811.

Care must be taken that, in compliance with the Statute 1696, cap. 15, when the deed is written bookwise, every page be signed.* See *Bothwells v. Earl of Home*, 17th November 1747, where a party was

* See *supra*, p. 97.

held free from the obligations of a deed written upon sixteen pages, he having only signed the last. The subscription ought to be written below the whole deed. In one case a deed was sustained, though part of the testing clause was written below the subscriptions; *Dury and Doig v. Dury*, 11th March 1753. But the authority of this decision has justly been doubted. It was pronounced by the narrowest majority of the Court, and appears to do great violence to principle.* A deed, consisting only of one sheet, was found ineffectual, being signed only on the first page; and an attempt to support it by reference to an authenticated draft, proved ineffectual; *Dempster v. Willison*, 15th November 1799.

M. 16936.

M. 16947.

With regard to those who can only write imperfectly, the rule deducible from the terms of the statutes is, that where a party can write his or her name, subscription by the hand of such party is the proper mode of execution. The words of the Act 1579, cap. 80, are precise, that writings shall be subscribed "by the principal parties, if they can subscribe;" and it is no objection although they cannot read the deed which they subscribe. Inability to read was no objection to execution by sealing, when deeds were so authenticated by parties who could neither read nor write.

SUBSCRIPTION
BY PARTIES
WHO WRITE
IMPERFECTLY.

We have seen that the Act 1672, which prescribes the mode in which parties are to subscribe their names, is not held to impose a nullity, but only to infer penal consequences where its injunctions are neglected; and it is probably a consequence of this, that its terms have not been so strictly construed as to render it imperative to subscribe the surname at full length. Deeds have accordingly been sustained, where the subscription was only by initials. The sufficiency of such subscription, where it is proved that the party was in use so to subscribe, is laid down by Mackenzie; and, although this is condemned by Erskine as contrary to the words and spirit of the statute, and the Court is censured by Mr. Ross for sustaining such executions, there is no doubt that, upon proof of the habit, signature by initials will validate a deed. At first it was allowed to prove the party's practice so to subscribe by his own oath; *Laird of Culterallars v. Chapman*, 16th November 1667. Afterwards the rule was to require evidence of the custom, and proof also by the instrumentary witnesses that the party did so subscribe the particular deed. Where the instrumentary witnesses were dead, a proof of the custom was held sufficient; *Couts v. Straiton*, 21st June 1681; *Galloway v. Thomson*, November 1683; *Thomson v. Shiel*, July 1729. See also the case of *Weirs v. Ralstons*, 22d June 1813, where, upon evidence of the party's practice, the Court was ultimately unanimous. But, although subscription by initials is permitted, the initials must be legible, and capable of being recognised as truly the initial letters of

SUBSCRIPTION
BY INITIALS
VALID.Inst. iii. 2, 4.
Inst. iii. 2. 8.
i. 136.

M. 16803.

M. 16804.
M. 16805.
M. 16810.
F. C.SUBSCRIPTION
BY MARK IN-
SUFFICIENT.* See also case of *Reid v. Kedder*, 30th July 1840.

PART I.
CHAPTER II.

the party's name, otherwise they will not be sustained, although such may be his ordinary mode of subscribing; *Din v. Gillies*, 18th June 1812; shortly reported in a foot-note to the case of *Weirs*, last cited. It is thus fixed, that a deed cannot be executed by the subscription of marks.

SUBSCRIPTION
BY BLIND PER-
SONS.

A question of great interest on this point, which long gave occasion to a variety of opinion, and has only recently been authoritatively fixed in principle, is as to the proper mode of authenticating a deed granted by a blind person. The points, which have given rise to much perplexity and considerable conflict of opinion, were—*first*, Whether, where a blind person could write, he was capable of executing a deed by subscription, or whether this infirmity implied such a total disqualification as to bring this case within the class to which notarial execution is proper; and, *secondly*, Whether it was essential that the deed of a blind person, executed personally or by notaries, should be read over, when executed, in the presence of the party and of the instrumentary witnesses. The contradictory views which prevailed upon these questions will appear upon referring to the case of *Couts v. Straiton*, 21st June 1681, where a deed signed with initials by a blind woman was sustained, upon the ground that, being capable of writing when she saw, she was also capable of doing so after she was blind, and as able to know what she subscribed as those who see and cannot read. In the next case, *Falconer v. Arbuthnot*, 9th January 1751, the subscription of a blind lady was reduced, and, although it was proved that her hand had been led, yet the opinion was delivered from the Bench, that a blind person could not legally sign, except by notaries. The other point, viz., whether it is necessary that the deed be read over to a blind person at the time of signing, was decided in the affirmative in *Ross's Trustees v. Aglianby*, 2d July 1792; but the contrary conclusion was arrived at in *Yorkstoun v. Grieve*, 2d December 1794. It will be observed that the doctrines thus introduced, viz., the incapacity of a blind person validly to execute a deed by his own subscription, and the necessity of reading the deed of a blind person in the presence of himself and the witnesses, rested not upon the statutes, which contain nothing to either effect, but upon the opinions of the Judges; and they resolved in effect into solemnities established by the authority of the Court of Session. The decisions which we have cited were reviewed, and the whole of this matter very carefully considered, in the case of *Duff v. The Earl of Fife*, when under appeal to the House of Lords, 17th July 1823. In that case it had been held by the Court of Session, (30th November 1819,) that a person not totally blind, though scarcely able to distinguish between light and darkness, ought to execute deeds by means of notaries and witnesses, and that certain deeds were reducible, because it had not been proved that they had been read over to the Earl of Fife, the

M. 6842.

M. 16817.

M. 16853.

M. 16856.

1 Sh. App. 498.

F. C.

party so circumstanced, before he subscribed them. The case was considered with great anxiety by the Lord Chancellor ELDON, and it was determined by the judgment of the Court of Appeal, that, according to the true intent and meaning of the Statute 1579, the signature of the Earl of Fife was the proper signature to give effect to the instruments in question, and that signature by notaries was not required—that, as the deeds were, *ex facie*, signed by the party, and attested by two witnesses, they were in law probative deeds, that is, deeds proving their own contents unless impeached—that, to impeach such instruments, being probative, the party challenging must prove that the witnesses did not see the Earl of Fife subscribe, or hear him acknowledge his subscription—that, to impeach them on the ground that Lord Fife was ignorant of their contents, it was not enough to shew that the deeds were not read over, but the pursuer must *prove* that the Earl did not know their contents, the reading over not being a solemnity required by law, and the knowledge of the party of the contents of deeds, duly executed and attested, being to be presumed, until the contrary should be shewn. This judgment was prepared with great pains, and its terms are instructive, the general result being, you will observe, to return to a simple observance of the solemnities required by the statutes, rejecting such as had been arbitrarily imposed without statutory authority. The principles thus established were acted upon in the case of *Ker v. Hotchkis*, 23d 15 S. 983. May 1837. The judgment in *Lord Fife's* case, however, did not exclude persons whose sight is greatly or entirely impaired, from using the assistance of notaries, although they are able to write; and in *Reid v. Baxter*, 19th December 1837, affirmed, 19th February 1840, where a person who could write his name was so defective in his sight that he could not read any written document, it was held that his execution of a deed by notaries was a good form of execution—that he might, if he pleased, have executed it by his own signature—but that he was also at liberty to take the assistance of notaries. I would remark in conclusion upon this point, that, when a blind person adhibits his own subscription, the deeds of such a party ought to be executed with great care and circumspection. Although it be not a legal requisite, the deed ought to be read over to the blind party, in order to exclude all suspicion of error; and I would recommend that, in such cases, the witnesses should be present, and see the party's subscription written, since difficulties might arise with respect to the acknowledgment of a party who has so little the means of identifying his own deed.

We come now to the case of a party who cannot write at all, in which we have seen that the law requires, in order to make the deed valid, notarial subscription. The case of *Din*, already cited, shows the

SUBSCRIPTION
BY NOTARIES.

PART I.
CHAPTER II.
11 D. 173.

invalidity of subscription by marks. The same doctrine will be found in *Graham v. M'Leod*, 30th November 1848, where it was observed on the Bench that "there is one mode, and one alone, of authenticating a document where the party cannot write."

P. 104.

The office of NOTARY was introduced in the Roman Law, in order to make provision for the execution of contracts by a public officer otherwise than in the judicial form, it being optional to parties to execute deeds themselves, or by the intervention of notaries. We allow of no such option, (under the exception above stated in the case of blind persons,) subscription by notaries being limited by us to the case in which the granter of the deed labours under permanent or temporary disability.

The Act 1540, cap. 117, required the subscription of one notary to the deed of a party unable to write; and by 1579, cap. 80, two notaries and four witnesses were required. This remains the legal form of execution, the only other statutory provision which it is necessary to notice being, that by the Act 1681, cap. 5, witnesses are debarred from subscribing in this case, unless they know the party, and saw or heard him give warrant to the notaries to subscribe for him, and in evidence thereof touch the notaries' pen.

NOTARIES MUST ASCERTAIN—
(1.) PARTY'S IDENTITY.

(2.) THE REASON OF THEIR ASSISTANCE BEING REQUIRED.

M. 16834.

M. 16837.

(3.) MUST RECEIVE WARRANT TO ACT.

THE ATTESTATION OF THE NOTARIES.

The first duty of notaries, who are called to execute the deed of a party unable to write, is to ascertain his identity. This is enjoined by the Act of Sederunt, 21st July 1688. They are next to make themselves acquainted with the party's reason for requiring the assistance of notaries; and, if a reason is stated which the notary knows to be false, he ought to decline acting. In one case a deed notarially executed was sustained, although the party could write, she being herself the challenger of the deed; *Veitch v. Horsburgh*, 31st January 1637. In another case the Court required a proof of the temporary inability of the party to write; *Clark v. Laird of Balgounie*, 3d January 1683. From these decisions it appears to follow, that, where a party who can write signs by notaries, the deed will be effectual against himself, and that the notaries' attestation is not conclusive evidence of a party's temporary inability to write. If satisfied that the case is proper for their intervention, the notaries will receive the party's warrant to subscribe for him. The warrant will consist of a request by the party to the notaries to execute the deed for him, and, in evidence thereof, the party will touch the notaries' pen. This must be done so as to be heard and seen by all the four witnesses. The warrant being thus given, the notaries will proceed to execute the deed, not by writing the name of the party, which is an irregularity not sanctioned by the law in any circumstances. They write an attestation, familiarly called a docquet, which states the cause of the party's inability to subscribe for himself, and that it is signed by

the notaries by his authority. The docquet may also contain the facts that the party touched the notaries' pen, and that the deed was read over to him in presence of the notaries and witnesses, although neither of these statements is essential. The notaries then subscribe each his own name to the docquet, and to every page of the deed.

Sir George Mackenzie has discussed the question, whether a nod would be a sufficient warrant, and he thinks that it would, since the requirement of the statute is that the witnesses *see* or hear the party give command, and since *nutus* was sufficient by the civil law to confer a mandate. It is essential, however, that the fact of the party having granted warrant or authority be inserted in the docquet; *Philip v. Cheap*, 26th July 1667; and this is required so imperatively, that the deed will be held null, even although it bears in its body that the notaries subscribed at the granter's command, if that fact do not appear in the docquet; *Birrel v. Moffat*, 18th June 1745. The granting warrant is thus a part of the solemnity of the execution; and as, where one subscribes himself, the witnesses attest his subscription, so, where the party executes not with his own hand but by notaries, the witnesses attest everything which is required to make this mode of execution equivalent to the party's own signature. The witnesses, therefore, must witness the warrant of the party as well as the signing by the notaries, and the deed will be reduced if they do not see or hear the warrant given, and see the notary's pen touched; *Johnston v. Johnston*, 3d November 1698; *Farmers v. Myles, &c.* 25th June 1760. But, although the authority must appear in the attestation, the same rule is not rigidly applied to the insertion of the token of that authority, viz., the touching of the pen. This formality is supposed to owe its origin to the old practice, which, as we have seen, was recognised by statute, of the notary guiding the party's hand. But, although the touching of the pen, as a token of the mandate, is necessary of observance in compliance with the statute, deeds have been sustained, where the fact of the party having touched the pen did not appear in the attestation; *Dallas v. Paul*, 13th January 1704; *Maver v. Russel*, 10th July 1710.

Notarial subscription is one act, and the notaries must sign simultaneously. Hence they are called co-notaries. On this point reference may be made to the case of *Cow or Coll v. Craig*, 21st March 1633. Upon the same principle the same four witnesses must attest the subscription of both notaries, and it will not suffice to have two witnesses to one notary, and two to the other; *Anderson v. Cock*, 24th December 1709; *White v. Knox*, 27th December 1711. There is a case shortly reported, *Cullen v. Thomsons*, December 1731, in which a deed was supported, although the notaries had not subscribed their attestation. It would rather appear from the Report, that they had written separate attestations, so that the name of each was contained

PART I.
CHAPTER II.
SUBSCRIPTION
OF THE
NOTARIES.
WHAT A SUFFICIENT WARRANT
TO NOTARIES?

M. 16835.

M. 16846.

4 Br. Supp.
418.
M. 16849.

Stair, iv. 42, 9.

M. 16839.
M. 16841.

NOTARIAL SUBSCRIPTION MUST
BE *uno actu et contextu*.

M. 16833.

M. 16840.

M. 16841.

M. 16842.

PART I. in the attestations in his own handwriting. Care should be taken to
CHAPTER II. leave no room for such questions.

We are now to examine particularly the requirements with respect to—

CONDESCENDING
UPON DESIGNA-
TION OF WIT-
NESSES.

5. *The Subscription of the Instrumentary Witnesses.*—We have seen that the Act 1540 contained in general terms a requirement of witnesses without enjoining that they should subscribe, and that the remedy provided by the subsequent enactment 1579, cap. 80, was imperfect. It ordained that deeds should be subscribed and sealed by the principal parties, if they could subscribe—otherwise by two notaries before four witnesses, denominate by their dwelling-places or some other evident tokens. The general practice which followed after this Statute, shewed that it was understood to require the designation of witnesses to deeds subscribed by the party himself, as well as when the subscription was by notaries; but, as the words of the Act were not free from ambiguity, the Court relaxed its operation (as thus understood,) so far as to allow the designation of the witnesses to be supplied by a note or condescendence, where it had been omitted to insert them; and, when the party claiming under the deed had so condescended, he was allowed to support his averment, that the persons named in the condescendence were the witnesses, by the evidence of these persons themselves, if still alive. If they were dead, and had subscribed as witnesses, then the proof consisted of a comparison of their subscription upon the deed with other writings of the same parties. In the last case, however, in which the objection of want of designation of witnesses was sustained, and a condescendence allowed, the judgment was reversed by the House of Lords, in so far as this objection was sustained, and it was ordered and adjudged that the want of designation of the witnesses should be repelled; *Urquhart v. Officers of State*, 28th July 1753.

M. 9919 and
9923.

WITNESSES
MUST SUB-
SCRIBE; AND
MUST BE DE-
SIGNED IN
TESTING-
CLAUSE.

1681, cap. 5.

This practice, thus ultimately found to be erroneous, continued until the passing of the Act 1681, cap. 5, which declared that only subscribing witnesses should be probative, and attached nullity to all writs in which the witnesses, as well as the writer, were not designed, declaring their designations not suppliable by condescendence. Sir George Mackenzie's observations upon this Statute commence with the reflection, "that the longer the world lasts, probation by witnesses lessens always in esteem, because men grow always more wicked." The progressive moral deterioration of the human species is the idea so tersely expressed by the Latin Poet—

HOB. Od. iii. 6,
46.

"Ætas parentum, pejor avis, tulit
Nos nequiores, mox daturos
Progeniem vitiosiore."

Craig consoles himself with the adage, that bad morals create good laws. But the truth probably lies in this, that oral testimony

in such a matter as the testing of deeds lessened in esteem, not from any decrease in the value of such evidence, but because it was discovered from practice, how uncertain and liable to error is the memory; and that, while it is subject to decay and death, *littera scripta manet*—the *littera scripta* being a mode of proof admirably adapted to this matter. We shall have occasion, as we proceed, to examine more closely the provisions of this Statute.

PART I.
CHAPTER II.

The first inquiry naturally is—Who may be witness to a deed? and the answer is generally—Any person not labouring under a natural or legal incapacity. We shall look at the grounds of incapacity *seriatim* :—

WHO MAY BE
INSTRUMENT-
ARY WIT-
NESSES?

(1.) Women are practically excluded from acting as instrumentary witnesses. This may be traced, no doubt, to the manners of a rude age, which invariably presents, as one of its characteristics, a state of subjection and degradation in females, inconsistent with the exercise of an independent judgment. Hence the legal incapacity of women, until a comparatively recent period in the history of our law, to give testimony in any matter civil or criminal. The progress of civilisation and the elevating influences of religion have, by their benign influence, relaxed that rule, and the evidence of women is now admitted in our Courts; but this relaxation has not been extended so as to admit them in the character of instrumentary witnesses. There is, indeed, no statutory exclusion; but there is no part of our practice more uniformly supported by usage; and it is the express *dictum* of Erskine, that women may not be instrumentary witnesses. In the case of *Setton v. Setton*, 24th February 1816, an issue was sent to a jury to ascertain the genuineness of the signature of an instrumentary witness who was a female, whereby it was assumed, if found genuine, to be sufficient to authenticate the deed. It is to be kept in view, however, that this is a question of great magnitude, and that the existing practice rests upon very grave considerations, its *ratio*, according to Mr. Tait in his Treatise on the Law of Evidence, being the inexperience of women in business, and their liability to deception. It would, therefore, be rash to infringe upon the established practice, before a different rule shall be authorized by a decision resulting from a deliberate and solemn trial of the question.

(1.) WOMEN?

Inst. iv. 2, 27.
More's Notes to
Stair, p. 399.
1 Murray, 9.

(2.) A pupil cannot be an instrumentary witness. In *Davidson v. Charteris*, 12th December 1738, a contract was annulled, one of the witnesses having been a few days less than fourteen years of age. The judgment of a minor—that is, one above pupilarity but less than twenty-one—is presumed sufficiently ripe for the act of attesting a subscription, and minors are, therefore, admissible as instrumentary witnesses.

(2.) PUPILS AND
MINORS?
M. 16899;
Elchies v.
"Witness,"
No. 2.

(3.) A blind person cannot be an instrumentary witness. He cannot see the party subscribe, and, although he may hear him

(3.) BLIND PER-
SONS?

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8 S. 205; and
8 Murr. 402.

acknowledge his subscription, that is unavailing, since he cannot see the subscription to connect the acknowledgment with it. It was expressly so found with respect to a deed executed by notaries, in *Cunningham v. Spence*, 2d July 1824; and, although there is in such a case the peculiar exigency to see the pen touched, it can scarcely be doubted that the same principle would regulate the question in a deed executed by a party himself.

(4.) IDIOTS, &c.?

(4.) Idiots and furious persons are incapable of acting as witnesses to deeds—

(5.) PARTIES
INTERESTED IN
THE DEED?
M. 16879.

(5.) And so also are those who have a material interest in the deed, as creditors and executors, or others taking benefit through the deed. Thus, in *Robertson v. Abercromby*, 21st November 1627, a bond was reduced, the creditor having been himself one of the two subscribing witnesses, so that it was, in effect, a deed attested by only one witness. The objection of interest in the case of witnesses generally is exemplified strongly in the case of *The National Bank v. Forbes*, 28th December 1849, where the shareholder of a bank was held inadmissible as a witness in a cause to which the bank was a party, even where there was *penuria testium*. In the case of *Lady Innerleith v. The Bishop of Glasgow*, 2d July 1613, the executor named in a testament having signed it as an instrumentary witness, it was reduced in so far as regarded his nomination. It may be doubted, perhaps, whether the principle of this decision would now be acted upon in cases where the executor takes no beneficial interest by the settlement; for it has been decided that a trustee nominated by a deed may be an instrumentary witness to it; *Mitchell v. Miller*, 30th November 1742. But the prudent conveyancer will of course avoid the risk of such objections. The disqualification of interest is not so rigidly applied as to exclude witnesses, to whom trifling legacies are bequeathed as marks of regard; *Ingram v. Steinson*, 22d January 1801.

12 D. 437.

M. 16876.

M. 16900.

M. voce "Writ,"
App. No. 2.

(6.) NEAR RE-
LATIONS?

Such are the cases of incapacity to act as witness to a deed. With the exception of the objection to women, they are reducible, it will be observed, to the two general grounds of natural incapacity or defect of judgment, and direct interest. There is another class of witnesses, long excluded by the general law of evidence in Scotland, not excluded, however, from acting as instrumentary witnesses; but with respect to whom I would say, that it would be proper for the practitioner to exercise judgment and discretion in selecting or avoiding them—I refer to near relations, who, on the ground of partiality and favour, were, until lately, entirely excluded from giving evidence, but, according to our institutional writers, and according to prevalent practice, were not excluded from acting as instrumentary witnesses. The principle of this, according to Erskine, is, that witnesses who attest the subscription of deeds, "are called for that purpose by the joint con-

Inst. iv. 2, 27.

“sent of both parties, which bars all challenge.” This principle, and the consequences resulting from it, will be found well illustrated in the case of *Falconer v. Arbuthnot*, 23d June 1750, where, in a question regarding testamentary deeds, the evidence of near relatives of the testator, who were instrumentary witnesses, was admitted on behalf of a party so nearly related to them, that their evidence for him would have been otherwise inadmissible, while that of other relatives equally near in degree, but who were not instrumentary witnesses, was rejected. See also the case of *Hamilton’s Creditors v. Hamilton*, 19th June 1713. It is justly remarked, however, by Sir George Mackenzie, that it is proper to choose disinterested witnesses; for, although the legal objection be obviated, still, in the event of any question arising, the witnesses may be examined as to the accuracy of their attestation, in which case there is the risk, through human infirmity, of relatives being swayed in giving their testimony. This caution, you will observe, is still applicable, notwithstanding that the evidence of near relations has been rendered generally admissible by the 3 & 4 Vict. cap. 59, § 1; for the ground of the caution is, not that a relative is inadmissible, but that he may be ineligible.

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M. 16759.

The principle of mutual choice in the selection of witnesses, which, in the language of Erskine, “bars all challenge,” has had so strong an effect given to it, that it has been held to render competent the attestation, as an instrumentary witness, of a person infamous, and, therefore, incapable formerly of giving evidence in a court of justice; *Lockhart v. Bailie*, 1st February 1710.

(7.) INFAMOUS
PERSONS?

M. 8433.

The next point is—How many witnesses are required? In a deed executed by the subscription of the party himself, two instrumentary witnesses are necessary. This is not by the authority of any statute, the acts being, as we have seen, silent in this particular. It stands, therefore, on the general law of Scotland, which requires the evidence of two witnesses to prove a fact. We have already referred to the case of *Robertson v. Abercromby*, 21st November 1627, where, one of the witnesses being the creditor in a bond, it was held to be attested only by one witness, and so reduced. By the Act 1579, cap. 80, we have seen that four witnesses are expressly required, along with two notaries, in a notarial execution. This rule is rigidly enforced, and it has in vain been attempted to eke out the number of witnesses by taking one of the notaries into account; *Lackie v. Cunningham*, 20th November 1627.

NUMBER OF
WITNESSES
REQUIRED.

M. 16879.

M. 16873.

What are the instrumentary witnesses to attest? They are called simply to verify the subscription of the deed by the party. One who signs a deed as an instrumentary witness, therefore, has no concern with its contents, and is not committed by his signature to anything which the deed may contain. He merely attests the fact that he saw the party write his subscription, or heard him acknowledge it.

WHAT DO IN-
STRUMENTARY
WITNESSES
ATTEST?

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 —
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 M. 16,890.

WITNESSES
 MUST KNOW
 THE PARTY
 SUBSCRIBING.

It was, accordingly, held to be no objection to a bond, that it was, when executed, so folded up, that the witnesses saw nothing but the granter's subscription; *Lady Ormistoun v. Hamilton*, 21st January 1708.

In order that the witness may be able to verify the party's subscription, it is requisite, in the first place, that he have a personal knowledge of the party. This is expressly enjoined by the Act 1681, which bears, "that no witness shall subscribe as witness to any "party's subscription, unless he then know that party;" and the requirement is just, since it is impossible for one to attest a subscription to be the subscription of a person named, if he does not know that person. Where he does not know the party, his attestation can import only that *a* man signed, not, as is required, that *the* man subscribed to whom the name signed belongs. It has sometimes been a difficulty with practitioners to determine what degree of knowledge in the witnesses is requisite. The question may be best solved by attending to the object of the requirement. Its purpose is to make sure that the party is truly the individual who bears the name which he subscribes. For such a purpose personal intimacy or acquaintance between the party and the witness is evidently unnecessary; but the witness ought, either of his own knowledge or upon information on which he can rely, to be satisfied as to the identity of the individual. This is a point of great importance, and should be carefully looked to. Within a few years I have seen money lent upon a bond lost, under circumstances where the loss would have been prevented, had means been used to identify the party. The deed was executed in a hotel in Glasgow, the witnesses being a waiter and another person, neither of whom had any personal knowledge of one of the professed granters of the deed, and it was eventually ascertained that it was not subscribed by the granter described in the deed, but by a party personating him. In *Campbell v. Robertson*, November 1698, a bond was found null, one of the witnesses deponing that he did not know the party whose subscription he attested, the witness being then a boy of 14, and called off the street for the purpose. In another case a disposition was challenged, on the ground that the witnesses did not know the party. The witnesses, although they had never seen the party before or since, had attested her subscription upon the assurance of her neighbours that she was the person described as granter in the deed, and the Lords found, that the witnesses had here such credible information, that the subscriber was the true person designed in the writ, that they might lawfully sign as witnesses; *Walker v. Adamson's Representatives*, 8th June 1716. This judgment appears to furnish the true criterion of the degree of knowledge requisite, viz. that the witnesses shall have credible information of the party's identity.

M. 16,887.

M. 16,806.

The statute requires, not only that the witness know the party, but that he "saw him subscribe, or saw or heard him give warrant to a notary or notaries to subscribe for him, and in evidence thereof touch the notaries' pen, or that the party did at the time of the witnesses subscribing acknowledge his subscription, otherwise the witnesses shall be reputed and punished as accessary to forgery." Sir George Mackenzie, in his Observations upon the Act 1681, relates, as the occasion of this part of it, the case of a lady, who, pretending that she could not write before a large company, desired to sign the paper in her own chamber, whereupon she got the paper with her, and at her return brought it back subscribed, and thereafter raised a reduction of the same paper as not truly signed by her. The purpose of the enactment, then, is indissolubly to connect the party with the deed, either by the witnesses seeing him write his subscription, or by their hearing him acknowledge it; and this part of the statute demands an implicit observance. It is very necessary to observe, that knowledge of a person's writing, however familiar and perfect, is no warrant for subscribing as witness. No degree of moral certainty, however great, can give effect to such an attestation. The test demanded by the Act is, not that the subscription be known, but that the party be seen to write, or heard to acknowledge it. The question which an instrumentary witness will have to answer if examined will not be—"Do you know this to be the party's signature?" but it will be—"Did you see the party write this signature, or hear him acknowledge it?" There is nothing as to which parties are more likely, in a confiding spirit, to glide unguardedly into error than this, unless it be laid down and rigidly acted upon as an irreversible rule, to abide simply and literally by the terms of the Act, and to append or permit no subscription as witness, unless the signature was seen written or heard acknowledged. The necessity for strictness in this particular will be appreciated, when it is stated, *first*, that, when a deed is challenged, it is allowed to examine the instrumentary witnesses as to whether they saw the granter subscribe, or heard him acknowledge his subscription. The competency of such an investigation is fixed by *Frank v. Frank*, 3d March 1795; and *Swany v. The Bank of Scotland*, 12th December 1807. And, *secondly*, that if it be proved that the instrumentary witness to a deed did not see the party's signature written, or hear it acknowledged, the deed is annulled; *Allan v. M'Kean*, 21st December 1803. In this case a disposition of heritage was reduced, upon the evidence of the instrumentary witnesses, that neither of them saw the granter sign, or heard him acknowledge his signature, their testimony being corroborated generally by the circumstances; and, in a later stage of an important case already referred to, it was held a valid ground of reduction, that one of the

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WITNESSES
MUST SEE
PARTY SUB-
SCRIBE, OR HEAR
HIM ACKNOW-
LEDGE HIS SUB-
SCRIPTION.

M. 16,824.
M. v. "Writ,"
App. No. 7.

Hume, 914.

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4 S. 335.

F. C.

witnesses had neither seen the signature written nor heard it acknowledged; *Earl of Fife v. Duff*, 22d December 1825. The decision in the case of *Smith v. Bank of Scotland*, 25th January 1821, as reported in the Faculty Collection, appears to militate against the doctrine now stated, the words of the rubric in that case being—“The genuineness of the granter’s subscription to a deed being admitted, found not a relevant ground of reduction, that the instrumentary witnesses did not see the subscription adhibited, or hear it acknowledged.” The facts of this case, however, did not warrant that general proposition. It is explained by Lord GLENLEE in delivering his opinion upon *Lord Fife’s* case, that, in the case of *Smith*, the challengers of the deed were those who had given it forth as fair and regular and binding on themselves, and had dealt with the world on the footing of its being binding, and had thereafter attempted to reduce it upon latent nullities known only to themselves. If, therefore, in this case the deed was sustained, although the witnesses did not see or hear, as required by the statute, it was sustained, not because these solemnities were not obligatory, but because, by *rei interventus*, by their own actings upon it, the parties had made it valid, even although it might be liable to latent objections.

- 2 Sh., App. 265. But it is clear from the report of this case in the Court of Appeal, 4th June 1824, that the ground, upon which the bond was ultimately held valid, was, that no satisfactory evidence was adduced of the allegation that the solemnities in question had not been duly observed. Upon the principle of the decisions in the cases of *Allan* and of *Lord Fife*, a bond was found not probative, having been signed first by the witnesses and afterwards by the granter, not in their presence; *Young v. Ritchie*, 2d February 1761. In order, however, to establish the nullity of a deed upon the grounds here referred to, the evidence must be clear and conclusive that the witness truly did not see or hear; and if the deed be *ex facie* correctly executed, the Court will not be easily moved by evidence of *non memini*, or even evidence of a more positive kind given after an interval of time; it will also be jealous of the evidence of the instrumentary witnesses themselves, contradicting their own attestation, unless such evidence be otherwise supported; and it will allow evidence to be adduced in support of the attestations. Thus, in *Sim v. Donaldson*, 23d November 1708, the deed was supported, though a witness, at the distance of twelve years after its date, did not remember seeing the party subscribe or hearing him acknowledge his subscription; and, in *Sibbald v. Sibbald*, 18th January 1776, the same judgment was given, though the witness, then eighty years of age, deponed, thirty-seven years after the date of the deed, that he had not seen the subscription adhibited. The case of *Frank v. Frank*, 3d March 1795, was to the like effect; and the more recent case of *Cleland v. Cleland*, 15th
- M. 17,047.
- M. 16,891.
- M. 16,906.
- M. 16,824.
- 1 D. 254.

December 1838, may be read with great profit, on account of the able expositions, contained in the Judges' opinions, of the rules for weighing such testimony as was there adduced, the settlement impeached having been sustained by a unanimous Bench in the face of the evidence of both the instrumentary witnesses denying upon oath their own attestations. See also *Condie v. Buchan*, 26th June 2 S. 432. 1823, and *Richardson v. Newton*, 28th February 1811; in the latter of which cases the instrumentary witnesses impugning their own attestations, the supporter of the deed was allowed to adduce evidence to show that the attestations were correct.

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Having seen the party subscribe, or heard him acknowledge his subscription, the witness is next to subscribe himself in compliance with the enactment that only subscribing witnesses shall be probative. We have already seen that the object and effect of the witnesses' subscription are solely to verify the granter's signature, and that witnesses have no concern with the contents of the deed. A witness's position, or knowledge of or connexion with the circumstances of the transaction, may no doubt implicate him; and, in such a case, the fact of his acting as an instrumentary witness may be an element affecting himself; but if so, he is implicated, not by acting as a witness, but by the circumstances which otherwise make him concerned in the transaction. Still the general proposition is true and undoubted, that a subscribing witness is committed to nothing but the genuineness of the signature which he attests.

WITNESSES
MUST SUBSCRIBE.

Usually the witnesses subscribe as nearly as may be opposite to the signature which they attest, each of them adding the word "*witness*" after his signature. The addition of the word "*witness*" is almost invariably observed, and it is a proper precaution for the witness's security, in order to mark distinctly the character in which he signs, but it is not indispensable, not being required by the statutes; and the body of the writ, if properly completed, shews in what capacity he subscribed. It will be found that this point, viz. that the addition of "*witness*" is not indispensable, was tried and so decided 4 Br. Supp. 163. in *Morison v. Lord Saltoun*, 23d February 1694, and in *Lord Blantyre*, 5th July 1850. 13 D. 40.

The most unexceptionable mode of attesting a deed is for the witnesses to subscribe immediately after, and in presence of, the principal party. This excludes the risk of irregularity—of the substitution, for instance, of any other deed by the granter in place of the one then executed, and also the risk of inconvenience from the absence of witnesses; or, it may be, of irreparable failure in completing the deed owing to the death of a witness before signing. The case of *Home v. Dickson*, June 1730, has been referred to, as shewing the importance of immediate subscription by the witnesses. Here a tack signed by the principal parties, but not by the witnesses, was left in the hands

WITNESSES
OUGHT TO SUB-
SCRIBE IMMEDIATELY.

M. 16898.

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of one of the persons who had been inserted as witnesses ; and, the witnesses having subscribed some days afterwards, the deed was found null, upon the ground that, as the meeting of parties had broken up without perfecting their contract, they were, therefore, free, and could not be bound except by a new act of their own, consenting to the witnesses' subscription. Now, as the report bears that the witnesses' subscriptions were appended at the instigation of one of the parties, this case must be viewed, I apprehend, as one in which the contract remained incomplete, not from delay in the subscription of the witnesses, but by the parties' own act ; and that the subscription of the witnesses at the instigation of one party, was a breach of the understanding with which the parties had separated. If the parties had separated with the understanding that their contract was completed, the subscription of the witnesses, although adhibited after a short interval, and the deed itself, would have been liable to no objection. But, although this case cannot be held to establish the necessity of immediate subscription by the witnesses, there can be no doubt that, for the reasons already stated, such is the correct practice, and it ought always, when possible, to be observed. It is not indispensable, however, for the witnesses to subscribe in the grantor's presence. The law upon this point cannot be better stated than in the words of the report of the first case in which it was solemnly determined :—"The Act 1631 does not require, in point of solemnity, "that the instrumentary witnesses should sign in presence of the "grantor, or that they should not lose sight of the deed in the interval betwixt his and their own subscriptions ; nor has it been so "understood in practice. The presumption of law is, that witnesses "will not sign a deed unless satisfied of its identity ; and although "there never ought to be any considerable interval, yet, when such "a case occurs, it must be judged of upon its whole circumstances ;"

M. 16824. *Frank v. Frank*, 3d March 1795 ; affirmed on appeal. Upon the same principles it is settled, "that it is not necessary that a deed be sub-

2 S. 544. "scribed by the witnesses at one and the same time ;" *Robertson v. M'Caig*, 1st December 1823. A writ has also been sustained, although one person, being witness to several subscriptions of successive dates, signed only once ; *Edmondston v. Edmonston*, 6th December 1749. This ought, however, to be regarded as an irregularity in practice, and each witness ought to subscribe at every successive date when he attests a new subscription. In the case of *Welshes v. Milligan*, 12th June 1794, a bond was reduced on the ground that one of the instrumentary witnesses was stated as attesting four subscriptions, while he had only seen one of them, and had heard no acknowledgment of the others, his evidence being corroborated by such discrepancy in the signatures as to excite suspicion of their being genuine. The error in this case arose from too easy credence being given by the writer of the deed to

the statement that the witness subscribing had attested all the subscriptions; and this suggests an important rule for the practical guidance of the Conveyancer, viz., that, when unable himself to be present at the execution of deeds, he should commit that duty only to persons of such judgment and integrity, that the information received from them may be implicitly confided in.

The next statutory requirement is—

6. *The insertion in the writ of the designations of the witnesses.*—

The Act 1681 requires this under the pain of nullity, enacting, that all writs, wherein the writer and witnesses are not designed, shall be null, and not suppliable by condescending upon the writer, or the designation of the writer and witnesses. And the enactment is more anxious and stringent in the case of the witnesses than of the writer; for in the last clause—which obviously refers to all the cases in which subscribing witnesses are required by the Act, since it gathers up all these cases under the terms “writ,” “instrument,” and “execution”—it is declared, “that in all the said cases the witnesses be “designed in the body of the writ, instrument, or execution *respective*, “otherwise the same shall be null and void, and make no faith in “judgment nor outwith.” Thus the requirement, as regards the writer, is, that he be designed in the writ; and with respect to the witnesses, that they be designed not only in the writ, but in the *body* of the writ. We have seen that a deed was sustained which did not contain the writer’s designation, in what is properly called the body of the writ, but bore it subjoined to his own signature as an instrumentary witness to the same deed. The terms of the statute, however, are too distinct and imperative with respect to witnesses to permit of such a relaxation or interpretation as to them. The want of the designations of the witnesses in the body of the writ is, therefore, an absolute nullity, incapable of cure. This was clearly brought out in the case of *Russell v. Paisley*, 17th December 1766, where a bond, in which the subscriptions of the principal parties and witnesses were acknowledged, was found null, the names and designations of the witnesses not being inserted in the body of the writ.

WITNESSES
MUST BE DE-
SIGNED IN THE
BODY OF THE
WRIT.

M. 16904.

When a witness signs by the initial or an abbreviation of his Christian name, or of any intermediate name, such name is to be inserted in full in the body of the writ, and care is to be taken that the correct orthography of the entire name be preserved. The designation must also be accurate, and such as to distinguish the individual from all others. Inattention or error in these particulars may be productive of consequences the most serious. The Court has, no doubt, in one or two instances, shewn an indulgent spirit in sustaining deeds chargeable with serious inaccuracies. Thus, in *Bank of Scotland v. M. 16909. Creditors of Telfer*, 17th February 1790, a witness was named Gibson

WHAT IS A
SUFFICIENT
DESIGNATION?

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- in the body of the writ instead of his true name *Dickson*. At a considerable distance of time, an addition was made to the deed by the writer of it, pointing out the error and correcting it, and, upon a challenge, the Court unanimously declared the objection ill founded. In this case, however, it is material to observe that, previously to the correction of the error, the bond had never been put on record, or judicially exhibited. Either of these acts would certainly have placed it beyond the power of correction. Again, in the case of *Stewart v. Stewart*, 2d March 1815, an instrument of sasine, which, by the same Statute 1681, must contain the designations of the witnesses in the body of the instrument under pains of nullity, was sustained, although the witnesses' names were written *Moor* and *Garvock* in the body of the instrument, while the real names as subscribed were *Moir* and *Garrock*. This was done by a divided Bench; and Lord IVORY, in his notes to Erskine's Institutes, expresses doubts whether either of these judgments would now be followed as a precedent. Baron Hume has reported a case, *Dickson's Trustees v. Goodall*, 15th December 1820, in which a witness subscribed *Wm. C. Davys*, while, in the body of the writ, he was designed "Major *W. C. Davis*, of Colonel French's "levy," the name Davys being spelt with a "y" in the subscription, and with an "i" in the testing-clause. This was not regarded as a fatal discrepancy, the variation of a single letter here not being substantial, and the individual being marked out by his designation. In the case of *Donaldson v. Stewart*, 13th May 1842, tried by the Lord Justice-Clerk and a jury, the deed bore to have been written by "an "apprentice to James Carstairs & Son, town-clerks of Cupar," and to have been subscribed in presence of the said James Carstairs, junior; and it did not appear on the face of the writing that James Carstairs was the junior partner of the firm "James Carstairs & Son." But the objection to the sufficiency of this designation appears not to have been sustained. On the other hand, the books contain many cases in which errors in the designation of witnesses have proved fatal. In *Abercromby v. Innes*, 15th July 1707, the assignation of a bond was found null, the Christian name of one of the witnesses being inserted as *John* instead of *Robert*. In *Halden v. Ker*, 9th November 1713, affirmed on appeal, the witnesses were thus designated, "Gilbert "Elliot, inserter of the sum, and Archibald Nielson, servitor to the "Laird of Cavers." The witnesses were both in fact servants to the Laird of Cavers, and it was maintained that the description "servitor" applied to both. But the Lords found that the witnesses were not sufficiently designed, and that the bond therefore was null. In *Lowe v. Beatson*, 25th January 1738, a writ was found null from neglect to insert the name and designation of one of four witnesses to a notarial execution. In *Graham's Creditors v. Grierson*, 26th December 1752, one of the instrumentary witnesses was designed
- P. 613.
- P. 925.
- 4 D. 1215.
- M. 17022.
- M. 16924.
1 Cr. & St.
App. 51.
- M. 17032.
- M. 16902.

"brother-german" instead of "brother-in-law," and the bond was, therefore, found void and null. In another case, a settlement bore the subscription of "*Thomas Hill*," as an instrumentary witness, but in the deed his name was written "*Thomas Hillock*," that being the name by which he had been familiarly known in his youth, and which he had at a former time used as his subscription; but the Court sustained the objection, reducing the deed; *Archibalds v. Marshall*, M. 16907. 17th November 1787. In *Douglas Heron & Co. v. Clerk*, 28th M. 16908. November 1787, a bond was reduced, one of the witnesses being designed in the deed, "Thomas Wars, servant to Thomas Nicholson, vintner in Edinburgh;" whereas the true name, as subscribed, was "Francis Wars." Here, it will be observed, there was enough to ascertain the identity of the witness, notwithstanding the error. It has been found not necessary, where the names and designation of the witnesses were correctly inserted, to state that they were witnesses; *Doig v. Ker*, 9th January 1741. The same was found in the case of M. 16900. *Wemyss v. Hay*, 5th June 1821, after a hearing in presence before all 1 S. 47. the Judges, and after contrary judgments.

It is the more important to avoid any error in this essential part of the deed, that no such error can be corrected after the deed is recorded or judicially exhibited. And so where, by a clerical error in a deed, the name and designation of the writer were omitted, and the designations of the witnesses, which were embraced in the writer's designation, were consequently wanting also, and application was made to the Court to authorize a short addition to be made to the deed after it had been recorded, in order to correct the omission, the Court refused to permit the correction, although the application appears not to have been opposed; *Brown*, 11th March 1809. The sequel of F. C. this case is reported by Baron Hume. A reduction of the deed having P. 923. been brought, the disponees petitioned the Court to sist the process till the testing-clause of the deed should be completed, in terms of the Statute. But, as we found on referring formerly to this report, the Court held that to authorize the addition prayed for would truly be to allow a condescence of the name and designation of the writer, which the Act 1681 expressly forbids.

There is no period limited within which the testing-clause of a deed must be completed, so long as the deed has not been put on record or produced in judgment. In *Blair v. Earl of Galloway and Others*, 15th November 1827, effect was given to a deed of which the testing-clause was not filled in until thirty-two years after execution; and in *Shaw v. Shaw*, 6th March 1851, it was held that a party having received delivery of a deed duly signed is entitled to insert a testing-clause whenever that is necessary, if there be sufficient space left for it.*

* In *M'Leod v. Cuninghame*, 20th July 1841, affirmed on appeal, a deed, in which the name of one of the witnesses appeared as *Crammood*, had been given in for registration in 5 Bell's App. 210. 3 D. 1288.

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F. C.

Where a deed by two parties was executed at the same time by the one personally, and by the other through the intervention of notaries, it has been held that the same persons might act as witnesses to both the personal and the notarial subscriptions, and attest them both by signing once; *Hardies v. Hardie*, 6th December 1810. In the Report it is given as a *ratio* of the decision that the witnesses had signed at the side of the notary's docquet, and not above it.

iv. 42, 19.

MENTION OF
THE PLACE OF
SUBSCRIPTION
NOT IMPERATIVE.

MENTION OF
DATE OF SUB-
SCRIPTION NOT
AN ESSENTIAL
IN THE GENERAL
CASE.

M. 16914.

7. *The Date and Place of Subscription*.—Lord Stair has included the date and place of the subscription of a deed as essential to be inserted in order to its validity. Such a doctrine, however, has no foundation in the Statutes, which contain no requirement to that effect, nor is it supported by invariable usage, deeds having at various times been supported which did not contain the date or the place of signing. Upon general principles, and apart from what the nature of the deed may itself require, there does not appear to be any ground of imperative urgency for demanding these particulars. The place where a deed was signed is not a point of any importance to its efficacy as an act of the granter, whose disposing power is independent of locality. It is only, therefore, when the regularity of execution is impugned, that the place of signing may become a point of importance; and then the designations of the witnesses will furnish a means of ascertaining the place through them. While, again, a granter's power of granting remains entire, the date of exercising the power is not an essential element in the exercise of it; and it is, therefore, only when questions arise which involve the point whether the granter's power did really subsist when the deed was granted, that the date becomes essential. Accordingly, in our very ancient deeds, there are no dates; and Craig says expressly, with respect to the date, "*solebat omitti*;" and instances of deeds supported where the date, and others where the place, had been omitted, as well as of deeds containing neither, will be found in the books. Thus, in *Duncan v. Scrimgeour*, 15th February 1706, the deed bore:—"I have subscribed thir presents written by George Henderson at Auchterhouse;" and the question arose, whether the words *at Auchterhouse*

the Books of Council and Session. It had been entered on the minute-book, and an extract issued; but, before it had been actually recorded, the party borrowed it up in terms of the Statute 1685, cap. 38, within six months of presentment, and added a clause bearing that the name of the witness was *Crammond*. The objection, that the deed could not be so altered after it had been given in for registration, and after the granter's death, was repelled by the Court upon the ground that it had never been beyond the party's control. But the testing-clause of a deed cannot be completed or amended, after it has been presented for registration in the books of a Sheriff-court. See further on this subject the recent case of *Macpherson v. Macpherson*, 7th February 1855. The completion of the testing-clause *ex intervallo* though competent, is to be avoided; and it has met with the disapproval of the House of Lords, in *Kedder v. Reid and Others*, 30th July 1840, *infra*.

17 D. 358.

1 Rob. App.
183.

denoted the writer's designation or the place of subscription. It was pleaded that both were intended, "the writer," (in the words of the Report,) "thinking it a great piece of laconic eloquence in one word "to express both." But the Lords "found the designation sufficient;" and this is, therefore, an instance of a deed sustained without specifying the place of subscription. In *Vallance v. M'Dowall*, 14th July 1709, the objection that the place of signing was omitted did not prevail. In another case the Lords expressly found "that "date and place are not essential to the validity of a writ, not being "mentioned *inter substantialia* in the Act of Parliament 1681;" *Ogilvie v. Baillie*, 21st July 1711; and the same judgment was given, in the case already referred to, of *Wemyss v. Hay*, 5th June 1821. But, while such is the law, there are clear grounds of expediency for laying it down as a rule invariably to insert the place and date; and the date is an essential, wherever the effect of the deed depends upon the date. Upon general grounds it is proper that a writing which claims the character and privileges of a Probative Deed should give its own history fully, and present upon its face the means of testing its own authenticity. Stair mentions an instance in which the falsity of a writ was detected by comparing its date with the stamp of the paper on which it was written, and which had not come into use until after the pretended date of the writing. The date of the fabric of the paper is a common test applied at this day in the challenge of writings, and every honest deed ought to invite such a scrutiny. Where there is occasion to suspect that the true date or place has been designedly suppressed, the deed will be unfavourably viewed, and presumed to be of the date least favourable to its own validity. This may be of fatal consequence in a competition of diligence, where the most unfavourable date will be attached to an undated deed. A disposition *mortis causâ* to the prejudice of the heir-at-law, if without a date, is presumed to have been granted within sixty days of death, and is, therefore, liable to challenge on the head of deathbed. It is, therefore, of primary importance to insert the date correctly in all deeds of settlement executed *intuitu mortis*.

The Statutes 1579, 1593, and 1681, all attach the sanction of nullity to the omission of the solemnities which they respectively impose—that is, they enact that deeds not executed with these solemnities shall be null and void. From this it follows that such deeds cannot be supported by any proofs, but are, in the eye of the law, absolutely null. We have already found illustrations of this under the several branches in which we have treated of these solemnities; and it is because the doctrine goes so deeply into the sufficiency of deeds, and is, therefore, of paramount importance, that additional cases are cited, in order to impress it the more deeply upon the mind. In *Kil-*

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DATE AND
PLACE OF
SUBSCRIPTION,
contd.
M. 5840.
M. 16896.
1 S. 47.
iv. 42, 19.
SANCTION OF
NULLITY AT-
TACHED TO
OMISSION OF
STATUTORY
SOLEMNITIES.
M. 12061.

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- patrick v. Ferguson*, 21st November 1704, an heir repudiated his father's bond, on the ground that it was null as wanting the writer's name. "The Lords thought it in a Court of Conscience a good and sufficient bond, but, as our law stood, it was null; though it was both unmannerly and unneighbourly to propone this nullity, yet, being proponed, the Lords behoved to sustain it, though hard, *quia ita lex scripta est.*" And in *M'Farlane v. Grieve*, 22d May 1790, the granter of a lease, his subscription of which was not denied, challenged it before possession had been taken, on the ground that the writer's name and designation were not inserted; and the tack was reduced. This case is reported in the Dictionary under the head *LOCUS PŒNITENTIÆ*, and properly so, because, this being a contract about land, to which writing is essential, the parties are not finally bound until writing legally sufficient has been completed. The deed being here defective in the statutory solemnities, the party was legally in the same position as if he had not signed, and he had, therefore, the power to resile. I will here again notice the case of *Russell v. Paisley*, in which a bond of caution was found ineffectual, although the subscriptions of the granters and witnesses were acknowledged, the testing-clause not being completed, and the names and designations of the writer and witnesses being, therefore, wanting; and also that of *Smith v. Bank of Scotland*, 25th January 1821, House of Lords, 4th June 1824, in which the granters of a bond attempted to get rid of their obligation by alleging that the witnesses had neither seen the subscriptions written nor heard them acknowledged—a case decided by the House of Lords expressly upon the ground that that allegation had not been established by satisfactory evidence.*
- M. 8459.
- M. 16904.
- F. C.
2 Sh. App. 265.

OBSERVANCE OF
SOLEMNITIES
MAKES THE
DEED PROB-
ATIVE.

We have now reviewed the solemnities requisite in the execution of deeds, having, in the first place, taken a general view of the history of them, and the enactments by which they were introduced, and having also examined in detail the terms of the Statutes as bearing upon each particular solemnity, and the decisions of the Law Courts with respect to the construction of the statutes, and the legal character of writings which have not been authenticated as the Acts require. It will be remembered that, in the outset of our inquiries on this subject, we found the purpose of solemnities in the attestation of writings to be simply this, viz., to render it certain that the deed is the deliberate and genuine act of the party. If the solemnities are faithfully observed, the law stamps the deed with this character that it is the party's act, and gives it effect as such, until it shall be impugned, and grounds established for denying such effect. We have seen how jealously the law demands an exact observance of the solemnities which it requires as the condition of the character of genuineness,

* See also the case of *Thomson v. M'Crummen's Trustees*, *supra*, pp. 97, 99, notes.

and that, if there be a failure to comply with any part of its requirements, then it will give no efficacy whatever to the writing, and no considerations of equity will suffice to supply that which the law has of its own injunction required to be established in this particular way. Where, however, the solemnities have been accurately observed, the deed is in the eye of the law genuine, and receives effect as probative—that is, as containing in itself evidence of its own purport and authenticity, so that it may be exhibited in judicial proceedings, and legal effect will be given to it, as shewing its own purpose, and establishing its own character and trustworthiness, without the necessity of any extraneous proof either by the parties to the deed or the instrumentary witnesses, or by any other persons whatever, as long as its authenticity is not challenged. Thus the deed is conclusive evidence against the granter of it, and all who represent him.

8. *Erasures, Deletions, Interlineations, &c., in Deeds.*—In order to a deed receiving the character of genuine and probative, it is necessary, also, that the text of the writing be entire, and not liable to suspicion; and if there shall appear upon it erasures, deletions, interlineations, or additions, the presumption of genuineness will be taken off, since no one is supposed to execute a vitiated deed; and the legal inference will be, (unless the contrary appear,) that such alterations were made after execution. In Balfour's *Practicks* it is laid down, that instruments, evidents, or writs, produced for probation of any action or defence, make no faith, neither should be received, if there be any rasure or diversity of handwriting, or alteration of the writ, especially in a substantial place. The same point is treated by Stair in the passage of his work already cited, by Erskine, and very anxiously by Mr. Ross in the part of his work that treats of the testing-clause.

P. 368.

iv. 42, 19.

Inst. iii. 2, 20.

i. p. 144.

It will tend to simplify the matter if we inquire, first, in what manner necessary and *bonâ fide* alterations may be made, such as corrections of clerical errors, or changes desired by the party after the deed is written out, but before signature. With regard to these the rule is, that the deed must shew that they have been advisedly adopted by the party; and this will be effected by mentioning them in the body of the writing. Thus, if some words are erased and others superinduced, you mention that the superinduced words are written upon an erasure; if words are simply delete, that fact is noticed; if words are added, it ought to be done upon the margin, and such addition signed by the party with his Christian name on one side and his surname on the other, and such marginal addition must be noticed in the body of the writ, so as to specify the page upon which it occurs, the writer of it, and that it is subscribed before the attesting witnesses. The ordinary practice of designating the part of

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CORRECTIONS
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TIONS IN DEEDS,
cont^d.

the line at which the marginal addition is to be taken in is by the conventional mark usually called a *caret*. I am not aware that any question has ever arisen out of this practice; but it appears to leave open a door to uncertainty, there being no sufficient security against a change in the position of the mark, which might materially affect the sense of the marginal addition. Where the addition, therefore, is of great importance, it would be prudent to fix unequivocally the place at which the marginal addition is to be introduced, by specifying not only the page, but the line and the words also between which it is to be held as inserted. The adoption of clerical corrections by the granter in our deeds has a precise parallel in the practice of the Roman Law, according to which such alterations were made by the party himself, and the formula added:—" *Lituras, inductiones, superinductiones, ipse feci.*" The doctrine is so well established in our law that no case appears to have occurred in which the effect of alterations upon a deed, expressly adopted by the granter, has been questioned. In *Kemps v. Ferguson*, 2d March 1802, the principle was clearly recognised, and a settlement vitiated by the testator himself after its date in the name of the executor, which is an essential part, was, nevertheless, found valid to convey legacies bequeathed by it. In another case, a bill of exchange had been altered in the sum from £60 to £50 by the acceptor himself at the time of his accepting it, and the bill was sustained by the Court as not vitiated; *Laidlaw v. Park*, 3d August 1774.

Brissonius de
Formula, 589.

M. 16949.

M. 16941.

VITIATION in
essentialibus.

When alterations by erasure, deletion, addition on the margin, or otherwise, are not noticed in the body of the writ, or expressly adopted by the granter, the effect of these will depend upon the nature of the alterations and the circumstances generally. It is quite certain that vitiation in an essential part of the deed will be fatal to the whole deed, unless it be separable, as in settlements, where vitiation of one legacy, though annulling it, may leave the rest of the deed entire. What is an essential part depends, as remarked by Lord Stair, upon the nature of the writ. In a bond, the sum of money—in a disposition, the name of the lands—in all deeds the name of the beneficial grantee, and everything requisite to give effect to the statutory solemnities, the name and designation of the writer and witnesses, and the numbering, and mentioning the number of pages, when there are more sheets than one. These are all, undoubtedly, *inter essentialia*. In an entail, also, all that is requisite to support the fetters is essential; so, where the words "it shall not be lawful to" introducing these, were written upon erasure, that was held a fatal vitiation; *Fraser v. Fraser*, 11th March 1854. In a disposition of heritage to take effect at the granter's death, the date is essential, in order to protect it from challenge at the instance of the heir-at-law on the ground of deathbed. In cases of a favourable

VITIATION in
essentialibus.

16 D. 863.

nature, and not apparently admitting of suspicion, the Court has admitted the evidence of the instrumentary witnesses to instruct the adoption of important alterations by the granter, as in *Arrot v. Gairden*, February 1730, where the date of a settlement was written on an erasure. The short report of this case concludes thus:—"In this case, the vitiation was of that nature, as scarce to admit of a suspicion of antedating." But more frequently this has been rejected, and it is not at all probable that such a supplemental proof would now be allowed. In the case of *Pitillo v. Forrester*, 22d November 1671, a deed of settlement was reduced, on the ground that in a material part half a line was so obliterated, that it could not be deciphered, and it was, therefore, presumed to be fraudulently delete by the party founding on the deed. In *Laurie v. Reid*, 9th July 1712, a discharge, altered in the sum from £13 to £30, was found improbable; and the question being raised, whether it was not at least good for the £13, the Lords, in the words of the report, "found it could not prove for a sixpence, being vitiated," and that, where papers are unduly touched, they are *in toto* null. The holder of the discharge was, accordingly, reduced to the necessity of proving by the granter's oath that even £13 had been paid. In the case of *Waddel v. Douglas*, 10th December 1705, it is observed as a common saying of the then Lord President (DALRYMPLE,) "that he who tam-pers with a writ should lose either the hand or the writ." In *Merry v. Howie*, 6th February 1801, the date of a settlement of heritage had been altered by erasure and superinduction. The alteration did not legally improve the position of the disponee. He was as secure with the true date, as the substituted date would have made him, had it been genuine. But the party being unable to trace this alteration in a part not essential to an innocent cause, the deed was reduced; and the decision was affirmed on appeal. In *Gibson v. Walker*, 16th June 1809, which was also affirmed on appeal, the name of one of the instrumentary witnesses was written upon an erasure, and the word *witness* was in a different hand. The deed was therefore reduced. In *Innes v. Earl of Fife*, 10th March 1827, a sasine was found null and void, the name of one of the parcels of lands being written in all the material parts upon erasures; and in the case of *Hoggan or Smith v. Ranken*, affirmed 30th July 1840, a sasine was reduced, because the word "three," in the year of the Christian era, was written upon an erasure, although the year of the King's reign was also given, and was liable to no objection. This result would not follow now, a special statutory provision (occasioned by the latter decision,) having been made, as we shall afterwards find, to allow such defects in instruments of sasine and resignation *ad remanentiam* to be supplied by accuracy in the record; but the decisions are instructive, in shewing the ordinary effect of vitiation

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M. 12285.

M. 11536.

M. 12284.

M. 11653.

M. App^t. v.

"Writ," No. 3.

F. C.

5 S. 559.

13 S. 461; 1

Rob. App 173.

6 & 7 Will. IV.

c. 33.

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6 D. 464; 6
Bell's App. 153.

12 S. 781.

13 S. 619.

1 Rob. App.
183.

in substantialibus. In the case of *Shepherd v. Grant's Trustees*, 24th January 1844, affirmed 21st July 1847, a deed of entail was reduced more than eighty years after its execution, on the ground that the designation of the first heir-substitute was written upon an erasure wherever it occurred throughout the deed. In *Reid v. Kedder*, 24th June 1834, and 6th March 1835, affirmed 30th July 1840, the letters *ohn*, of the name *John*, the intended disponee in a settlement of heritage, were written on erasures throughout the deed, the name having previously been *James*. In the testing clause, after the words "are subscribed," the words were added "*in favour of the said John Kedder, my son,*" but the erasures were not noticed. The deed was reduced. The views of Lord BROUGHAM in delivering his judgment upon this case imply that a proper notice of the erasures, amounting to a clear adoption of them by the granter, would have obviated the objection. There is much in his Lordship's opinion that deserves the careful consideration of Conveyancers, as to the mode in which erasures should be noticed and adopted. In the case of *Kirkwood v. Patrick*, 25th June 1847, an obligation to reconvey lands between and Martinmas eighteen hundred and forty-six, was held invalid, the word *forty* being written upon an erasure. But where the alteration, even although in an essential part, is slight, and enough is left entire clearly to preserve the sense, the deed will be supported, provided there be no reason to suspect fraud. Thus a deed was sustained, although the word *pages* in the testing clause was written on an erasure, the pages being numbered and the passage sufficiently explicit to make the sense of it certain, even holding the vitiated word *pro non scripto*; *Morrison v. Nisbet (Cauvin's Trustee)*, 30th June 1829. In another case, the deed was written upon thirteen pages, and in mentioning the number of preceding pages, the letters *ve* of the word *twelve* were written upon an erasure; but the deed was, notwithstanding, sustained, the number of pages being sufficiently expressed by the words in so far as entire; *Gaywood v. M'Eand*, 19th June 1828. In like manner the letter *x* in the word *six*, used to express the number of pages, having been written on an erasure, the objection was not sustained; *Cassillis v. Kennedy*, 2d June 1831. In another case, part of the paging of a deed was upon erasures, but the pages being evidently continuous, and the number of pages correctly stated in the testing clause, the deed was sustained, there being no appearance of fraud; *Wood v. Ker*, 13th November 1838.* In the case of *Grant v. Stoddart*, 27th February 1849, the word *five* in a

* The Faculty Report of this case bears that the Lord Justice-Clerk, with the other judges concurring, held the erasure to be "a mere clerical correction, not militating against the "authenticity of the deed." See also the case of *Thomson v. M'Crummen's Trustees*, *supra*, pp. 97, 99, notes.

legacy of five hundred pounds was written upon an erasure, but the legacy was, notwithstanding, sustained, upon the ground that the word so superinduced was written by the testatrix herself, although the rest of the deed was written by another and attested. This view was taken by the Court in conformity with the principle followed in *Robertson v. Ogilvie's Trustees*, 20th December 1844, where it was held that erasures written upon by the granter do not vitiate a *holograph* deed. In connexion with the decision in the case of *Grant*, however, it seems important to keep in view the observations which fell from Lord Chancellor LYNCHURST in deciding *Grant's Trustees v. Shepherd*, 21st July 1847, where words being superinduced upon erasures *in substantialibus*, but not authenticated, he held that no evidence could be received for the purpose of proving when, or by whom, or under what circumstances, the alterations were made; and that according to the doctrine of Erskine, already cited, they must be presumed to have been made after execution. And, upon the assumption that the alterations had been made by the granter who had power to revoke, he held that the erasures, being made intentionally and deliberately, would constitute a revocation, so that the erased words, (even if they could be ascertained,) could not be restored, and that the words written on the erasure could not be substituted in lieu of them, because no evidence appeared, or could be admitted to shew, that they were written before the execution, and, therefore, that they were unauthenticated and inoperative.

The decisions, in which venial faults have not sufficed to invalidate the deed, afford certainly no encouragement to laxity or carelessness in preserving the integrity of the text in writing. On the contrary, they suggest the necessity of the utmost circumspection and care, by showing how minute are the points upon which the security of important rights may depend. It has been repeatedly held that the name of an executor or trustee is not an essential part of a settlement in this respect, and that a vitiation there will not invalidate the remainder of the deed. In the case, already referred to, of *Kemps v. Ferguson*, 2d March 1802, the name of the executor originally appointed was delete, and another interlined, but the settlement was held effectual to bequeath a legacy contained in it. So it was held no objection to a trust settlement, that the name of one out of five trustees was delete; *Earl of Traquair v. Henderson*, 26th June 1822; and a similar decision was given where the names of three trustees were written upon erasures, there being four others not vitiated; *Robertson v. Ogilvie's Trustees*, 20th December 1844. In these cases, there was no room for the suspicion of fraud, the alterations having been made by the testators themselves. In the case of *Richardson v. Biggar*, 19th December 1845, the nomination of an

VITIATION IN
ESSENTIALS,
contd.

7 D. 236.
6 Bell's App.
153.

Inst. iii. 2, 20.

M. 16949.

1 S. 527.

7 D. 237.

8 D. 315.

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executor was sustained, notwithstanding that a word was written upon an erasure, without which word the nomination was not explicit, the objection on the ground of the erasure being removed, as the circumstances eventually turned out. In *Adam v. Drummond*, 12th June 1810, an important word being written upon an erasure, it was held *pro non scripto*, but, there being no ground to presume a fraudulent intention, the remainder of the deed was sustained. Where a party had made his settlement in three deeds bearing the same date, and executed simultaneously duplicates of all the deeds, and there were found numerous erasures and superinductions not noticed in the testing clause, the vitiating effect of these alterations was held to be obviated by the fact, that, with two immaterial exceptions, no erasure occurred in the same place both in the deed and in its duplicate, the one being entire wherever the other was erased; *Strathmore v. Strathmore's Trustees*, 1st February 1837, affirmed 30th July 1840.

15 S. 449; 1
Rob. App. 189.

MARGINAL
ADDITIONS.

M. 12274.

4 Br. Supp. 242.
Inst. iii. 2, 20.

As a marginal addition, when properly signed and tested, becomes an integral part of the deed, so any undue interference with it will have the same effect as upon any other part of the writ; and, therefore, a deed was reduced *in toto*, the margin, which contained an important addition, having been cut away; *Cunningham-head v. Town of Lanark*, 26th June 1628. But the omission to subscribe a marginal addition does not affect the validity of the deed, only such addition is held *pro non scripto*; *Carnegie v. Ramsay*, 16th January 1695. Mr. ERSKINE holds, that in mutual contracts a marginal note on one copy, and not upon the other, is probative against the holder of the copy which contains it; but that, if the note be in his favour, it is not binding on the other party, unless it be supported by his oath, or by other posterior writings, or, in special cases, by the testimony of the instrumentary witnesses.

BLANKS IN
DEEDS.

6 S. 479.

9. *Blanks in deeds*.—There are certain blanks of style which occur in some deeds, and the omission of which, by neglecting to leave vacant space, is awkward, and may be attended with injurious consequences. On the other hand, every deed ought to be complete when executed, and no blanks should be left which can be avoided. This ought to be laid down as a rule for security's sake, and in order to avoid the risk of questions. It is only important blanks, however, that will have the effect of annulling a deed, and where the substance of the granter's meaning can be ascertained notwithstanding the occurrence of blanks, these will not be allowed to defeat his intention. In *Ewen or Grahame v. Hutcheon*, 5th February 1828, a bequest of a sum to found a charitable institution was sustained by the Court of Session, although the testator, having signified an intention that the sum left should accumulate in his trustees' hands until it amounted

to a certain sum, had neglected to fill up the blank intended to contain the accumulated sum, and had also neglected to fill up a blank left for the number of boys to be received into the charity ; but the decision was reversed on appeal, the House of Lords holding the testator's intention to be uncertain, and the deed, therefore, inept ; 17th November 1830. By the ancient practice, it was customary to execute bonds with the names of the creditors blank ; and such bonds were transferable simply by delivery from hand to hand, like bank-notes. The ground, upon which this usage obtained a footing was, that it saved all expense of transmission. Several cases are reported arising out of questions connected with blank bonds ; see Dictionary, *voce* BLANK WRIT. They were attended with great risk to the granter, inasmuch as, after they had passed into the hands of a third party, he (the granter) was cut off from pleading against them compensation of debts owing to himself by the original grantee ; *Henderson v. M.* 1653. *Birnie*, 27th February 1668. Blank bonds were also attended with prejudicial effects to the creditors of parties holding them, the facility of transference rendering it difficult to secure them for the benefit of creditors. In consequence of these and similar effects, such deeds were rendered illegal by the Act 1696, cap. 25, which—upon the preamble of the occasions of fraud and many pleas and contentions, arising from the subscribing of bonds, assignations, and dispositions, and other deeds blank in the name of the person in whose favour they are granted—enacts, that no such deeds be subscribed blank ; and that the person or persons, in whose favour they are conceived, be either insert before or at the subscribing, or at least in presence of the same witnesses who are witnesses to the subscribing, before the delivery ; and the Act contains a certification, that all writs subscribed and delivered blank shall be declared null. As the Act thus expressly provides for the validity of bonds, although subscribed blank in the creditor's name, provided the name be supplied before delivery, they will be presumed to have been completed before delivery, unless the contrary be proved ; *Ruddiman v. Merchant Maiden* 1696, cap. 25. *M.* 11562. *Hospital*, 30th July 1746. Erskine holds that the statute, as *Inst.* iii. 2, 6. illustrated by these cases, will support a bond in such circumstances, even although the name of the creditor be inserted by a writer not named in the deed. But this is not warranted by the cases cited. In one of them the writer of the name was specified, and in the other the report bears that the Judges, who supported the deed, thought the hand the same as that of the writer of the deed. It would certainly be hazardous to risk the validity of a deed by leaving it open to such an observation, as that the essential matter of the grantee's name was written by a person not named or designed ; for this Act, though it allows a latitude in time up till the delivery of the deed for inserting the creditor's name, does not in any respect

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4 Wil. & Sh.
App. 846.

BLANK BONDS.

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BLANK BONDS,
contd.

7 S. 640.

dispense with the requirements of the previous Statute 1681, cap. 5, or of the other statutes regulating the solemnities of executing writs. This statute is declared not to extend to the indorsation of bills of exchange, or the notes of any trading company.* A striking example of the application of the Act is presented in the case of *Pentland v. Hare*, 22d May 1829, in which a trust-deed, having been executed in India, blank in the names of the trustees and also in the purposes which were afterwards filled up in this country, was found null both at common law and as struck at by the statute. In *Abernethie v. Forbes*, 16th January 1835, a deed of entail was executed, while the name of the last substitute was blank, and the entailor instructed his agent by letter to complete the testing clause, and to insert the name of John Gordon in the blank. The deed being challenged by the heir first called, in order to get rid of the fetters, the Court held it good as regarded all the heirs insert before subscription, the nullity in the statute being held to refer only to persons whose names are improperly inserted. It is irrelevant to object to a bond that the sum was not filled up when it was signed, there being no special averment of fraud, or allegation even that it was not completed before delivery; *Baillie v. Scott*, 25th June 1828.

13 S. 263.

6 S. 1016.

SOLEMNITIES
SELF-IMPOSED.

1 Sh. App. 65.

It remains only in this branch of our inquiries to remark, that a party in executing a deed may prescribe solemnities to himself in addition to those which we have seen that the statutes require; and that the absence or cancellation of such self-imposed forms will prevent the writing from receiving effect, upon the principle, that every test which the maker of a deed chooses to establish as evidence of his purpose, must be complete, otherwise it is to be presumed that his intention either was not perfected, or that it was altered. This doctrine received effect apparently for the first time in the case of *Nasmyth v. Hare*, decided in the House of Lords, 27th July 1821, upon appeal from the Court of Session, of whose judgment there is no report. Here there was a testament holograph of the maker, and concluding thus:—"In testimony of this being my last will and testament I hereby set my hand and seal, and declare it to be written upon three pages, and signed in my own handwriting at Edinburgh this 28th day of September 1803." It was signed by the party, and it had also been sealed; but when the deed was found in the deceased's

1 Bell's Com.
391.M. v. "Bill of
"Exchange,"
App. No. 17.
18 D. 428.

* Bills blank in the drawer's or payee's name, were formerly held to be struck at by the Act 1696. "But the view now taken is, that the statute does not apply to the case of bills; and that the acceptance is an undertaking to pay to the person who shall have right to the document, like a note payable to bearer;" *Ogilvie v. Moss*, 26th June 1804. Neither is a missive letter, engaging to deliver iron "to the party lodging this document with me," struck at by the Act; *Dimmack v. Dixon*, 1st February 1856. The deeds contemplated by the statute are deeds which require for their formal completion the name of the creditor to be filled in, and the observance, when they are not holograph, of the requirements of the Statute 1681.

repositories, the seal had been cut off. By the Law of Scotland, this will being holograph,—that is, entirely written by the deceased himself,—would have been valid had it contained no mention of a seal; but it was held by the House of Lords, reversing the decision of the Court of Session, that by the excision of the seal, the deed had been revoked and annulled, the Lord Chancellor ELDON stating it as a universal principle, that any person may prescribe to himself solemnities with respect to a will of personalty, beyond what the law requires him to observe; and that having prescribed it as a law to himself that he does seal as well as sign, signature alone will not do.

It is fixed by the case of *Earl of Dalkeith v. Henrybook*, 13th February 1728, that the Act 1681, cap. 5, applies to the execution of deeds by consenters as well as by the principal parties, and the subscription of consenters must, therefore, be attested by witnesses according to the statutory provisions.

EXECUTION OF
DEEDS BY CON-
SENSERS.
M. 16898.

10. *Privileged Deeds*.—There are certain writings to which the Law gives effect, although not executed according to the statutory solemnities. These are called Privileged Deeds, because by a privilege, or special exemption from the general statutory requirements, they receive legal force, although destitute of the formalities prescribed by these requirements.

In this class are included holograph writings. Where the body of a deed is written by the granter himself, the law justly considers that circumstance to be a pregnant proof that it is his own genuine act; and such writings, accordingly, receive legal effect, although not attested by witnesses. From the term holograph, the privilege might appear to be limited to such writings as are entirely in the handwriting of the granter; but it is extended also to those deeds of which the essential parts are in the granter's writing, although the remainder be written by another; *Vans v. Malloch*, 23d January 1675. Here a M. 16885. bond, having but one witness, was sustained, the substantial parts being written by the granter, viz, his own name, the sum of the bond, the penalty, and the date. This enlargement of the class of privileged writs has been extended to include writings in the hand of another, entirely improbable, and of which no part is written by the granter, provided such writings be adopted in a writing by his hand. Of this an example appears in the case of *M'Intyre v. Macfarlane's Trustees*, 1st March 1821, where there was a codicil containing a F. C. legacy of £300, improbable, not holograph, and merely signed by the testator. But he had added in his own hand, "I add to this that "Jemmy M'Intyre" (the legatee) "is to have all my furniture," &c.; and the codicil was held to be validated by this addition. If this case of *M'Intyre* is compared with that of *Dundas v. Lewis*, 13th May

HOLOGRAPH
WRITS PRIVI-
LEGED.M. v. "Writ,"
App. No. 6.

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HOLOGRAPH
WRITING, *contd.*

- 1807, the result is instructive. In the latter case, two codicils, subscribed by the party, but not holograph or tested, were decided to be ineffectual. Here, then, is a very important rule in practice, and the observance of which is often attended with great convenience, viz., that an improbativ writing may be adopted by the holograph and signed memorandum of a party, clearly expressing his intention to do so. In the case of *M'Intyre*, the concatenation was but faint, depending upon the words "I add to this," and the Court was narrowly divided as to its sufficiency. Whenever, therefore, a Conveyancer is called upon to direct such an operation, he should take care that the holograph addition contains a reference so clear and distinct as to exclude all doubt. Adoption by subscription of a docquet on the envelope, however, is not sufficient where authentication of the writing enclosed is necessary by law, as in a deposition upon a reference to oath; *Cleland v. M'Lellan*, 22d January 1851. In the case of *Logan v. Logan*, 27th February 1823, a direction upon a sealed packet containing settlements, directing the packet to be destroyed unopened in an event which happened, failed of receiving effect from not being holograph of the party, although subscribed by him. An acknowledgment of the receipt of £400, although signed and addressed by the borrower, was not held entitled to the privileges of a holograph writing, no other part of it being written by him; *Alexander v. Alexander*, 26th February 1830. Where a holograph deed is executed without witnesses, it must be proved to be holograph; but if the writing bear that it is written by the granter, that raises a presumption which will entitle it to be regarded as holograph, until the contrary be proved; *Earl of Rothes v. Leslie*, 9th December 1635; *Robertson v. Ogilvie's Trustees*, 20th December 1844. In the latter case, a statement *in gremio* of the deed, that it was written by the granter, was held to be *primâ facie* evidence to that effect, and to throw the burden of proving the contrary upon the challenger. But, although it may be neglected to mention in the deed that it is holograph, that may be proved *aliunde comparatione literarum* or otherwise; and *primâ facie* evidence that the body is in the same handwriting as the signature, will suffice to throw the *onus probandi* upon the party challenging; *Turnbull v. Doods*, 29th February 1844. In the challenge of a holograph writing, the evidence of witnesses who saw the deed written and subscribed, although not inserted as instrumentary witnesses, is full probaton, prevailing against all contrary presumption; but when the proof of holograph is by comparison of writings, or by the evidence of witnesses who know the handwriting, such proof may be more easily controverted by other evidence; *Rentown v. Earl of Leven*, 11th July 1662. A holograph writing stands secure upon its own privilege as written by the granter; and, therefore, even although it be subscribed before witnesses, it will form no ground of
- 13 D. 504.
2 S. 253.
- 8 S. 602.
- M. 12605.
7 D. 236.
- 6 D. 896.
- M. 12652.

reduction to allege that the witnesses neither saw the party sign, nor heard him acknowledge his subscription. It was so found in *Yeats v. Yeats' Trustees*, 6th July 1833.

PART I.
CHAPTER II.
11 S. 915.

Although a holograph writing is allowed by its own contents to create the presumption that it is truly holograph, the same privilege is not extended to its statement with respect to its own date; and it is a fixed principle in our law, that no holograph writing without witnesses can prove its own date. The ground of this doctrine is, that parties may antedate their deeds, and by doing so affect the interests of others in a manner which would not ensue if the writing bore its true date. Hence it follows that, whenever the effect of a holograph deed depends upon its date, it will be held to be of the date least favourable to its own validity, whatever date it may profess to bear, if the fact of its date rests upon the evidence of itself alone, and is not supported by other adminicles of proof. The result of this principle in controlling the effect of holograph writings is very important, and is variously exhibited, according to the interests of the different parties with which holograph writings are brought into competition. These are deserving of careful attention. Thus—

HOLOGRAPH
WRITS UNAT-
TESTED DO NOT
PROVE THEIR
OWN DATES.

(1.) The holograph obligation of a married woman, of which the date is not proved by extrinsic evidence, is of no effect in subjecting her husband to liability for the debt, and, in a question with the husband, will be presumed to have been granted after marriage; *Temple v. Lady Whittinghame*, 20th January 1636. M. 12490.

(2.) A holograph settlement of heritage, not tested, and not proved to have existed sixty days before the maker's death, will, in a question with the heir, be presumed, whatever date appears upon its face, to have been executed within that period, and will, therefore, be reducible upon the head of deathbed; *Dows v. Dow*, 24th June 1681. M. 11477.

(3.) Where the competition is with a creditor who has used inhibition, a holograph writing dependent solely upon itself for evidence of its date will be presumed, whatever it may bear to the contrary, to have been granted of a date posterior to the inhibition; *Braidie v. Laird of Fairnie*, 21st June 1665. M. 12275. Upon the same principle it was formerly held that, in competition with an arresting creditor, a holograph acknowledgment of intimation would not be received as evidence *per se* of the priority of the intimation, and that, therefore, if it was not supported *aliunde*, the arrester would be preferred; *Earl of Selkirk v. Gray*, 22d July 1708. This doctrine, however, was afterwards departed from on the ground of universal usage; and in *Newton & Co. v. Collogan & Co.*, 23d November 1785, a holograph acknowledgment of intimation was sustained as proving its own date. M. 4453. M. 850.

The general principle is well illustrated in the case of *Winton v. Gibson & Winton*, 1st June 1831, where a letter, produced to prove

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the purpose for which a bill was granted, was not admitted as evidence, as it wanted the part of the sheet containing the address, and had no post mark or other adminicle to verify its date. In order, therefore, that a holograph deed may receive the effect, to which it is entitled if established to have been executed of the date it bears, that date must be instructed by evidence external to itself; and the proof must be pregnant—that is, full and unexceptionable, wherever there is room for the suspicion of fraud.

SUBSCRIPTION
OF HOLOGRAPH
WRITS.

The general rule, which requires subscription as a necessary solemnity in the execution of deeds, applies also to holograph writings, and, if these are not subscribed, it will be presumed that the party's intention was altered or not completed. In peculiar circumstances, however, and where there is reason to presume that the writing is complete without subscription, the absence of subscription will not prevent its receiving effect; as in the postscript to a letter, which it is not usual to subscribe, and where there is no room for the presumption of incomplete intention, if the letter is sent. Accordingly, in two old cases, unsigned holograph postscripts were held binding; *Wauchope v. Niddrie*, 11th July 1662; case "*Anent a Postscript to a Letter*," 13th February 1671. It has been decided that where a bill or promissory note is holograph, and contains the obligant's name in its body, but not his subscription, it is a binding document, the name being (in the words of the Report) "equal to a subscription," although it will not warrant summary diligence; *A. v. B.*, July 1750; and in the case of *Gillespie v. Donaldson's Trustees*, 22d December 1831, a party having in his deed of settlement declared that all legacies should be effectual which were bequeathed in separate writings or memoranda, "although the same be not formally executed, "provided the same express my will and intention, and are written, "dated, and signed by me," a holograph writing not subscribed by the testator, but containing his name and designation, was held to be in law a signed memorandum. In the case of *Robertson v. Ogilvie's Trustees*, 20th December 1844, which we have had already occasion to cite, an opinion was given from the Bench that erasures in *substantialibus* do not vitiate a holograph deed, if it be proved that the writing superinduced is holograph.*

The distinction between holograph deeds and those which require the solemnities of attestation is strikingly illustrated in *Miller v. Farquharson*, 29th May 1835, where an acknowledgment subscribed by three parties and holograph of one of them, was found to be ineffectual against one of the subscribers who was not the writer of it; but it is assumed in the pleadings and in the Judges' opinions, that

* See *supra*, pp. 126, 127, and cases of *Grant v. Stoddart*, and *Shepherd v. Grant's Trustees*, there referred to.

M. 16965.
2 Br. Supp. 517.

M. 1442.
10 S. 174.

7 D. 236.

13 S. 838.

the document afforded an undoubted claim against the subscriber by whom it was written. PART I.

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In treating of privileged deeds, Erskine has included those subscribed by a number of persons members of a corporate body, or even by a number of private persons, the parties being presumed, he says, to have been witnesses to each other; and, in support of this doctrine, he refers to the cases of *Forrest v. Veitch*, 19th July 1676, M. 16970. and *Seabox of Queensferry v. Stewart*, 7th January 1732. But, in M. 16899. Lord Corehouse's note in the case of *Miller* above cited, it is explained 13 S. 838. that neither of these cases can be regarded as an authority upon this point; and in *Rankin v. Williamson*, 14th February 1633, the plea M. 16881. that witnesses were unnecessary to a writ subscribed by four persons, as they were witnesses to each other, was repelled; and, in *Duke of Douglas v. Littlegil's Creditors*, 23d November 1742, the same argument having been maintained on the authority of Sir George Mackenzie's observation on the Act 1579, "that where there is a tripartite contract subscribed by the parties, they are in place of witnesses to one another;" this was treated by the Court as untenable, since no writing bears all parties to be at the same time present at subscribing. The doctrine, that if there are more than two obligants to a deed they are to be held as witnesses to each other's subscription, was expressly repudiated in the case of *Miller*, where it is characterized by Lord COREHOUSE as "ill founded and pregnant with danger;" and, although the note of the same eminent Judge in this case bears, "if the exception is to be admitted at all, it must be confined to the case put by Mr. Erskine, of a deed granted by a corporate body or a numerous association;" yet the grounds for admitting the practice even to that limited extent are so slight as to make it incumbent upon the prudent conveyancer to disregard the doctrine entirely.

DEEDS BY MANY PERSONS.
Inst. iii. 2, 23.

The expression in the Act 1579, cap. 80, "obligations of great importance," has been fixed by uniform practice to mean writs of which the subject-matter exceeds in value £100 Scots or £8, 6s. 8d. sterling. Where, therefore, the value does not exceed that sum, witnesses are not requisite, unless it be to be annually paid; for, although the requirement of the designation of the writer and witnesses in 1681, cap. 5, applied generally to all deeds, yet in practice it has been limited to those which are of importance in the sense of the previous statute, and has never altered the earlier practice in regard to inconsiderable writings. The importance of a deed in this matter is to be determined by a consideration of the debtor's interest or liability, and the deed will be reckoned of importance if the sum exceed £100 Scots, although it may be payable to several parties whose respective shares will each be less than £100; *Anderson v. M.* 16836.

DEEDS OF LESSER MOMENT.

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PRIVILEGED
DEEDS, CONT'D.

M. 6840.

M. 16848.

Tarbat, 16th January 1668. In this case a bond for £300 Scots, divisible equally among three parties, was reduced because subscribed only by one notary. But an obligation subscribed by one notary, although for a sum exceeding £100 Scots, will be sustained, provided the creditor restrict his demand to that amount; *Morton v. Elliot*, 22d January 1630. A bond *ad factum præstandum* is indivisible, and cannot be so restricted; but a claim for damages under such a bond, in respect of non-performance, is divisible, and may be restricted so as to validate the writing to the extent of £100 Scots; *Ferguson v. Macpherson*, 30th June 1758.

TESTAMENTARY
WRITS, HOW
FOR PRIVI-
LEGED.

Inst. iii. 2, 23.

M. 16849.

M. 15952.

11 D. 543.

5 Wil. & Sh.
App. 785.
6 Sh. 864.ONE NOTARY
AND TWO WIT-
NESSES SUFFI-
CIENT IN TES-
TAMENTS.

Mr. ERSKINE says that "testamentary deeds are so much favoured, " that if the testator's intention appear sufficiently, they are sus- " tained, though not quite formal, especially if they be executed " where men of skill in business cannot be had." This doctrine, how- ever, must be received with very great caution. In the two cases which Mr. Erskine cites in support of it, the testaments were holo- graph. We have already seen, that a codicil receives no effect, if it be neither holograph nor duly attested; and it does not appear that a testamentary deed has in any case been sustained, where it was not either attested by witnesses, or holograph. In the case of *Farmers v. Myles*, 25th June 1760, a testament was reduced, the witnesses to the notarial execution having neither heard the testatrix authorize the subscription, nor seen her touch the pen; and in *Crichton*, 12th January 1802, a testamentary deed, not holograph, and wanting the name of the writer and the designation of the witnesses, was found ineffectual. In this case it was observed from the Bench, that an improbate writing has never been sustained as a conveyance of moveable succession, unless there has been a *penuria peritorum*, as in the case of military testaments made abroad. I am not aware, however, that any case is reported in which an improbate testament was sustained. In *Rankine v. Reid*, 7th February 1849, an attempt was made to support a codicil, neither tested nor holograph, upon the plea of favour to testamentary writings. But that argument was disre- garded, and the writing found ineffectual. An improbate writing may form part of a settlement, provided it is referred to in a deed which is probative, and the connexion by reference clearly made out. This was the ground upon which an improbate letter was held effec- tual by the House of Lords in *Inglis v. Harper*, 18th October 1831, reversing the judgment of the Court of Session in *Buchan v. Inglis*, 27th May 1828. The letter was referred to in the probative deed as of the same date, and as containing instructions to the executor.

There is a privilege, however, extended to testamentary deeds by the concurring authority of all our Institutional Writers, viz., that in a testament of moveables, however valuable, by a party unable to

write, execution by one notary in presence of two witnesses is sufficient. Some doubt was unexpectedly thrown upon this doctrine in the case of *Galletly v. Macfarlane*, 1st August 1843, where the Lord Justice-Clerk HOPE reserved, at a Jury trial, for the determination of the Court, whether a testament, bequeathing between £200 and £300, could by the Law of Scotland be validly executed by only one notary and two witnesses, instead of two notaries and four witnesses. The doctrine is, however, expressly laid down by Stair, by Erskine, and also by Mr. Bell in his Commentaries, who places it upon the ground of preventing “the inconvenient and overwhelming effect of the presence of many witnesses in the last hours of life;” and in Tait’s Law of Evidence the rule is stated as not doubtful. The case of *Bog v. Hepburn*, 18th January 1623, is a decision directly supporting the validity of a testament so executed; and *Stoddart v. Arkley*, 18th December 1799, is to the same effect.

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§ D. 1.

iii. 8, 34.
Inst. iii. 2, 23.
i. p. 324.

P. 109.

M. 16960.

M. 16857.

Previous to the Reformation, it was usual for clergymen to be notaries. By the Statute 1584, cap. 133, clergymen are excluded from acting as notaries in any matters, “the making of testaments alone excepted;” and Lord Stair thinks, that the exemption of testaments from the rule requiring two notaries rests upon this reason, that ministers are ordinarily with sick persons at their death. This view, which connects the making of a testament by a minister as notary, with the pastoral tie, is supported by a decision finding that the Act does not give a universal power to ministers to be notaries in testaments, and that they can act as such in their own parishes only; *Hepburn v. Laird of Wauchton*, 31st January 1606. It is by virtue of his clerical office alone, that a minister is a notary in testaments. His execution must contain the essentials of a valid notarial execution; and, therefore, where a testament signed by a minister did not bear to have been so subscribed by warrant of the party, it was found null; *Williamson v. Urquhart*, 23d February 1688. But where a minister, acting in this capacity, had signed the name of the party instead of his own, the Court allowed the testament to be completed by the addition of a notarial attestation by the minister after the party’s death; *Trail v. Trail*, 27th February 1805.

PARISH MINISTERS MAY ACT AS NOTARIES IN TESTAMENTS.

M. 16827.

M. 16838.

M. 15955.

Receipts and discharges to tenants for their rents are, on account of the rusticity of tenants, exempted from the statutory solemnities, and sustained, though neither holograph nor tested; *Schaw v. His Tenants*, 4th July 1667; *Boyd v. Storie*, 7th November 1674.

RECEIPTS TO TENANTS.

M. 16966.

M. 16968.

The grounds upon which the writings necessary in conducting commercial transactions are effectual, although not executed with legal formality, are clearly stated by Mr. Bell in his Commentaries. It would be injurious to commerce to require formal writings in transactions of frequent occurrence, and to which it is indispens-

WRITINGS in mercatoria, PRIVILEGED.
i. 324.

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CHAPTER II.

WRITS *in re mercatoriâ*,
cont^d.

- ably requisite that their progress should be rapid, and that the business should be done in a spirit of confidence. Mercantile writings also regulate the transactions between subjects of different states, and would be rendered impracticable, if it were attempted to subject foreigners to a compliance with the peculiar formalities of the Municipal Law of other States. The writings thus privileged are generally those employed in, or which have a direct relation to, mercantile affairs; such as orders for goods, mandates, offers and acceptances in sales of goods, writings relating to the carriage of goods, bills, promissory notes, and cheques upon bankers; and the privilege which such writings enjoy is, that they are authentic without witnesses, although not holograph. They enjoy also this privilege, in addition to those of holograph writings, that their dates do not require to be proved by extraneous evidence. Subscription by initials, if customary by the party, is binding upon him, although not effectual to authorize summary diligence. The following are examples of the legal effect given to improbable letters and missives *in re mercatoriâ*. In *Ramsay and Hay v. Pyronon*, 12th July 1632, a letter from one merchant to another, acknowledging payment of a sum of money, not holograph, was sustained upon evidence merely of the party's subscription. In *Thomson v. Orichton*, 11th January 1676, a commission to sell goods, subscribed by initials, was sustained, the party being accustomed so to subscribe, and the subscription proved by adminicles. In *Brebner*, 18th January 1803, a letter of indemnity, not holograph, and not naming the writer or the names and designations of the witnesses, was sustained as a binding obligation. Here it will be useful to observe the terms of this letter of indemnity, which was a simple voluntary undertaking, containing no condition upon which the indemnity should be dependent; and to compare this case with that of *Robertson & Co. v. Galloway and Reid*, 11th December 1821, in which also an improbable letter of indemnity was found obligatory. In the latter case, however, you will observe from the terms of the letter, the undertaking was made dependent upon the condition, that a certain sum of money should be advanced upon the day it was written. Here, therefore, the principle of *rei interventus* would have validated the letter, even although it had not been *in re mercatoriâ*; while the case of *Brebner* contained no other element or ground of privilege, excepting only that the writing was *in re mercatoriâ*. In the case of *Pater-son v. Wright*, 31st January 1810, an attempt was made to draw a distinction in a letter of guarantee between its application to past and to future furnishings. It was held by the Lord Ordinary not to be a letter *in re mercatoriâ*, in so far as regarded furnishings prior to its date, but to be a sufficient guarantee for the subsequent articles. This, however, was altered; and it was observed that the Law of Scotland bends to the *lex mercatoria* for the facility of commerce; that a

letter of guarantee is as often given on account of a transaction finished, as on account of future furnishings; and that the security of the debt already incurred was a ground of credit for the future furnishings, which were, therefore, to be held as made on the faith of the guarantee for past transactions. The principle of *rei interventus*, therefore, came in support of the document here also. This judgment was affirmed on appeal, 4th July 1815.

We have only further to refer in this place to the important point of fitting and discharging accounts. Where such accounts are *in re mercatoriâ*, a discharge is held probative, though wanting witnesses and the writer's name; *Leslie v. Millers*, 27th January 1714. But a discharge, in order to be so protected, must be *in re mercatoriâ*; and if the account be not in relation to mercantile matters, the discharge will not be sustained without the solemnities. The case of *Campbell v. Montgomery*, 30th May 1822, where a discharge was supported, although alleged to be improbable, is too briefly reported to show the grounds upon which that objection was disregarded.

We shall not now dwell longer upon the subject of mercantile writings. We shall, ere long, have occasion to examine the subject of bills of exchange and promissory notes, in so far as relates to the subject of conveyancing in connexion with these writs, and any observations with respect to their form and requisites will be more conveniently introduced then.

The last class of deeds, to which we shall refer as receiving legal effect, although not authenticated according to the statutory formalities, is that of Foreign Deeds. This is a rule founded upon the law of nations, and adopted by every civilized state upon a principle styled *comitas legum*, as expressive of the respect due by one state to the laws of another. It is only within certain limits, however, that this rule receives effect; and the leading principle which regulates its application is this—that deeds executed in a foreign country affect that portion of the maker's property, which is held to accompany his domicile. By a fiction of the law, all a man's personal property is presumed to be along with his person, and under the protection and control of the state where he resides. It is, therefore, to personal contracts and obligations made in a foreign country, that the privilege is extended; and, if these be executed in conformity with the law of the country in which they are made, they will receive the same effect, in so far as that is competent, as if they had been executed in Scotland, and completed according to the solemnities of our law. An example of this is presented in the case of *The York Building Company*, 31st January 1783, where bonds in the English form, and transferred by blank indorsements, being objected to as defective by the Law of Scotland, the objection was disregarded by

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PRIVILEGED
WRITS, CONTD.

FITTED AND
DISCHARGED
ACCOUNTS.

M. 16978.

1 S. 446.

FOREIGN DEEDS,
PRIVILEGED *ex
comitate*.

M. 4472.

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PRIVILEGED
DEEDS, *contd.*

10 D. 1408.

1 S. 89.

3 S. 45.

FOREIGN DEEDS,
contd.

M. 4464.

M. 4462.

the Court; and in *The Great Northern Railway Company v. Laing*, 24th June 1848, a mandate authenticated by a seal, as required in England where it was executed, was held valid. The principle of *comitas legum* is in some instances allowed to operate, so as to regulate the contract between the parties according to the *lex loci contractus*, even although the terms of the contract should be inconsistent with the statutory law of this country; thus, in *Wilkinson v. Monies*, 28th June 1821, the Court gave judgment for interest at 7 per cent., being the rate allowed upon open accounts by the laws of South Carolina, although the highest legal rate in this country was 5 per cent.; and in *Gillow and Company v. Burgess*, 21st May 1824, a claim of interest which would have been sustained by the law of this country, was disallowed, the law of England, which was the *locus contractus*, permitting no interest upon book-accounts.

As this authority given to deeds executed in foreign countries is founded upon the jurisdiction derived by the foreign country through the person of the grantor over his personal estate, no such result can follow with respect to his heritable estate, which is immovable, and remains subject to the law of the country in which it is situated. The heritable estate can thus be effectually conveyed, or otherwise affected, by those forms alone, which have been sanctioned by the law of the country where it lies; and as the Law of Scotland, besides requiring the statutory solemnities in deeds relating to heritable rights, has adopted certain rules, according to which alone heritage can be transmitted, it follows that a foreign deed not executed according to those solemnities or rules can have no effect in the conveyance of a Scottish heritable estate; and so utterly inept and void is a foreign deed for this purpose, that it will not even found an action against the grantor of it to oblige him to grant a formal disposition; *Earl of Dalkeith v. Book*, February 1729. But although a foreign deed is ineffectual to convey heritable property, an obligation to convey such property in Scotland, (which is of the nature of a personal contract,) may be effectually undertaken in a deed executed according to the law of a foreign country; *Cuninghame v. Lady Semple*, 5th July 1706. This was a case of mutual indentures, executed in England between two brothers, and perfected by delivery, in which they bound themselves that the survivor should succeed to the other's estate. These indentures the Lords found a sufficient foundation to reduce a disposition granted by one of the brothers, contrary to the obligations contained in them. Where a deed executed in the English form is so conceived as to confer upon the grantee an interest or claim according to the law of Scotland, that claim or interest will receive effect, although it would not be available against real estate in England, and this being a question determinable by the law of this country, the Court will not inquire what effect such

obligations would receive against heritage in England ; *Weir v. Laing*, 6th December 1821. PART I.

It is a question not apparently decided, and upon which opposite opinions prevail, whether a power of attorney or commission, executed according to the law of the granter's residence, but not probative according to the Law of Scotland, be a sufficient authority to the mandatory to execute a conveyance of lands. By some it is held, that the faculty to convey is a power personal to the granter, and which he may competently depute according to the legal forms which regulate his personal obligations ; while others hold that this being in the matter of the title of a Scottish heritable estate, the commission must be probative according to the law of this country. While the point remains unsettled by a clear authority, Conveyancers will no doubt deem it prudent to act upon the opinion which requires the deed to be unchallengeable by the law of Scotland.

In order that a deed, executed according to the laws of a foreign state, may receive effect in Scotland, its nature must be such as is agreeable to the law of Scotland—such, that if a similar deed were executed in strict conformity with the law of Scotland, it would, without doubt, receive effect. Therefore, a testament executed according to the law of England, and which, by the law of that country, would be effectual to convey lands in England, will receive no such effect in Scotland, the law of which holds null any settlement of heritage by a testament, although executed agreeably to its own forms. Therefore, in *Melvil v. Drummond*, 3d July 1634, a Scottish heritable bond was found not legally conveyed by an English testament ; and in *Crawfurds v. Crawford*, 14th January 1774, the same was found with respect to a testament made in Holland. But where the Scottish heritable estate is conveyed by a formal disposition, duly executed according to the law of Scotland, and referring to a foreign will made, or to be made, for the purposes to which such estate is to be applied, such a disposition and will taken together will form an effectual settlement ; *Ker v. Ker's Trustees*, 24th February 1829 ; *Cameron v. Mackie, &c.*, (*Dick's Trustees*) 19th May 1831, affirmed 29th August 1833. It also follows from the principle that a foreign deed must be such that a deed of the same nature would receive effect in Scotland, that a nuncupative testament, although made formally, and binding according to the law of the country where it is made, will receive no effect in Scotland, where nuncupative testaments are rejected, in so far as they exceed the sum of £100 Scots.

In order that a foreign deed may receive effect in this country, it is an implied condition that it be valid according to the law of the country where it was made. In the words of Lord ELLENBOROUGH :—“ A contract must be available by the law of the place where it is

CHAPTER II.

1 S. 192.

FOREIGN DEEDS, contd.

NATURE OF FOREIGN DEED MUST BE AGREEABLE TO LAW OF SCOTLAND.

ENGLISH TESTAMENT DOES NOT CONVEY SCOTCH HERITAGE.

M. 4483.

M. 4486.

7 S. 454.

9 S. 601.

7 Wil. & Sh. App. 106.

FOREIGN DEED MUST BE VALID ACCORDING TO LAW OF COUNTRY WHERE IT WAS MADE.

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Jarman and
Bythewood's
"Conveyanc-
ing," i. 732.

"entered into, or it is void all the world over." When a question arises with regard to the validity or import of a foreign deed, which falls to be determined according to the law of the country where the deed was made, the law of that country is ascertained by obtaining the opinion of eminent lawyers. In Mr. Erskine's time it appears that the opinion of the judges in foreign countries was procured in such cases. By the modern practice, a case is laid before eminent counsel, and their answer is held to fix the foreign law. The law of the foreign country is regarded as matter of fact to be ascertained in the manner mentioned. But it must be truly a point of law proper to the foreign country that is resolved in this manner. A foreign lawyer having given the construction of a will upon questions submitted to him, and having subsequently, upon a further question put by the Scotch judge, answered that the construction was not dependent upon the foreign law, or upon its technical rules, but to be dealt with according to the plain interpretation of the words, and that the Judge of any court, conversant with the language, was entitled and bound to give his judgment according to his own understanding of the words used—the construction was held not to be matter of foreign law, and the Court not bound, therefore, by the opinion returned; *Thomson's Trustees v. Alexander*, 18th December 1851.

14 D. 217.

EVIDENCE OF
AUTHENTICITY
OF FOREIGN
DOCUMENTS.

As a general rule, in order to be received in our Courts, foreign documents require to be authenticated by a notary public, or British consul, or the mayor of the town. English letters of administration, being familiarly known in Scotland, are admitted without authentication; *Disbrow v. Mackintosh*, 27th November 1852.

15 D. 123.

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CHAPTER III.

THE GENERAL STRUCTURE OF DEEDS—THE CLAUSES COMMON TO MOST DEEDS—THE NATURE OF WARRANTICE—REGISTRATION OF DEEDS.

IN the first part of our subject, which related to the things requiring to be observed in all deeds, we have now examined two subordinate heads—the first relating to the preliminary conditions of capacity in the parties, capability of conveyance in the subject matter, and consent in the granter; the second embracing the statutory solemnities of deeds, with a notice of the instruments enjoying the privilege of exemption from these solemnities. We now proceed with the third head of the first part, in which, agreeably to our plan, we are to examine the general structure of a deed, and the clauses which are common to most deeds.

That portion of a deed which expresses compliance, and in itself complies, with the statutory solemnities, and which, on account of its function as a witness to the strict observance of these solemnities, is called the testing-clause, is in reality the only part which is common to all deeds. Each class of instruments has, no doubt, its own peculiar array of clauses, or, as Blackstone terms them, “orderly parts;” and of these clauses or orderly parts some are common to various classes; but the testing-clause alone is that which none of them can dispense with, and which gives to every instrument the character of a solemn deed. In the large space, therefore, which we have given to the consideration of the solemnities of execution, and of the mode in which they require to be expressed and exhibited in the testing-clause, a broad foundation has been laid which, it will afterwards appear, serves with but few exceptions for every part of the subject. At the same time there are some other things essential to all deeds, and a few clauses common to many, and it will be useful and convenient to bestow a short attention upon these at this point.

1. *The Name and Designation of the Granter of the Deed.*—These must be accurately set forth. This is usually done at the commencement. But it is not essential that the granter’s name and designation

TESTING-
CLAUSE ALONE
COMMON TO ALL
DEEDS.

NAME AND
DESIGNATION
OF GRANTER.

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NAME AND
DESIGNATION
OF GRANTEE,
cont'd.

M. 16918.

occupy that place. In some cases it is convenient, and even necessary, that it be otherwise—as in deeds of accession by creditors, and other deeds to be subscribed by parties not known when the deed is prepared, and in which it is convenient and safe to avoid the repetition of many names. Such writings begin with the general “*We*,” or, in the third person, “*The parties*,” and they refer to the testing-clause for a specification of the names and designations of the granters. In whatever part of the deed, however, the grantor is named, his name must be correct, and he must be so designated by his profession, or residence, or other certain description, as to distinguish him from all other persons. This is the criterion of the sufficiency of a designation, viz., that it so marks out the party that there can be no doubt of his identity; and an instance of it is presented in *Dickson & Heriot v. Logan*, 22d December 1710, where a contract of marriage, which bore to be written by the said Mr. John Dickson (the husband) was sustained, although he was not otherwise designed therein than in the usual expression that the parties contractors accepted of each other as their lawful “future spouses.” We have already seen in a testamentary writing the designation of the grantor supplied by construction from his relationship to parties named in the writ. Contracts of marriage and testaments, however, are favourably regarded; and these decisions shew that this is a point to be carefully attended to, and that no room for dubiety ought to be left. I have not met with any case of an error in the grantor’s name. In treating of the designation of witnesses we have found that a misnomer of a witness is fatal, although there may be no doubt as to the person; and under the title *FALSA DEMONSTRATIO* in the Dictionary, you will find several examples of estates ineffectually attached, owing to errors in the names of attainted parties. These cases also illustrate the distinction between a designation on the one hand, which, although meagre, yet distinguishes the person, and is, therefore, held sufficient, and positive error on the other hand, which vitiates, although there may be no room for doubt as to the individual. Thus, Lord Forbes of Pitsligo was attainted by Act of Parliament by the name of Alexander Lord Pitsligo, and he claimed his estate notwithstanding, on the plea that the attainder could not affect him, since it did not mention him by his true title of Lord Forbes of Pitsligo. The Court of Session sustained the claim, but the decision was reversed by the House of Lords, on the grounds that, although in the patent of nobility the title was *Lord Forbes of Pitsligo*, yet the claimant and his ancestors had subscribed deeds and other instruments, sometimes by the name or style of *Forbes of Pitsligo* and sometimes simply *Pitsligo*—that they had been described in legal proceedings in both ways—that they had been entered on the rolls of Parliament, and been described in Acts of Parliament by the style of *Lord Pitsligo*—and that it was not

alleged that any one else was called by that title. This case is reported under the name of *Dickie v. The King's Advocate*, 16th November 1749. On the other hand, the attainder was found ineffectual in *Macdonald v. The King's Advocate*, 21st December 1751, the Christian name of the party having been inserted in the Act as Donald instead of Ronald. The circumstances under which these decisions were pronounced were, no doubt, such as to prevent the deduction from them with certainty of fixed rules on the point to which we now refer. But it cannot be without its use to observe the important distinction observed in the disposal of cases decided under the same general circumstances. The designation of a party as an officer in the army or navy is sufficient without his residence; *Gordon v. H. R. H. Prince Albert*, 28th November 1851. And, where there was an error in a widow's maiden name, but her residence and the name of her deceased husband were correct, the error was disregarded upon the rule *constat de personâ*; *Muir v. Hood*, 10th July 1845.

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M. 4155.
M. 4162.

14 D. 114.

7 D. 1009.

If the granter executes the deed in a particular character, as tutor or curator for a minor, or as factor, trustee, or otherwise, that character ought to be added immediately after his designation; and when the deed is granted with the consent of another, the name and designation of the consenter are to be set forth, and a statement given expressive of the interest in relation to which the consent is given. These points will be fully and particularly illustrated when we come to examine the details of particular deeds.

NAME AND DESIGNATION OF GRANTEE, *concl.*

The foregoing observations relate to *deeds*. In such writs as are the grounds of diligence, or the commencement of a process in which decree is to follow, the name and designation must be correct; but an error in the course of procedure, as in a reclaiming note, is less material, and may be corrected; *Mackenzie v. Cameron*, 20th May 1853.

15 D. 664.

When a party has occasion for any cause to change his name, it is not unusual to apply to the Court of Session for authority. But there is no need of judicial authority to entitle a man in Scotland to change his name; *Young*, 14th January 1835; *Kinloch v. Lourie*, 13th December 1853.

13 S. 262.
16 D. 197.

2. *The Cause of Granting*.—After the granter's name and designation, there is generally inserted the cause of granting, which is technically called the consideration, i. e., the price, or loan, or other reason, in consideration of which the deed is granted. Strictly speaking, it is not in every case necessary to express the consideration, but it is indispensable to do so in some cases, as in apprentice deeds, and deeds of conveyance and sale, in which the Stamp Acts require the consideration to be truly set forth; and it is almost without exception always advisable to mention the cause of granting, not only that the deed may be impressed with the character of fullness and authenti-

CONSIDERATION, OR CAUSE OF GRANTING.

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DEEDS GRATUITOUS—RATIONAL—ONEROUS.

city, but in order to shew also its true legal effects, which in some respects, and particularly, as we shall presently see, with regard to the warrandice implied by the terms of the transaction, are dependent upon the nature of the consideration.

When the cause of granting is love or regard, as in voluntary provisions to relatives or others, the deed is said to be *gratuitous* or *lucrative*,—lucrative, that is, with respect to the grantee, to whom it is gain, as he has given nothing for it. A deed granted, because the party sees it to be right, although enjoined by no law or obligation, is, with reference to the cause of granting, termed *rational*. A deed granted for a price or other consideration, as in sales, loans, contracts of marriage, &c., is said to be *onerous*. When no consideration is stated, the deed is presumed to be gratuitous; and, on the other hand, the bare statement of a consideration will not be received as evidence that a deed is truly onerous where the circumstances are suspicious, as in writings granted on the eve of bankruptcy in defraud of creditors. Of this examples are given in notes 5 and 6 on page 189 of the second volume of Bell's Commentaries, from two unreported cases. In one of these, the statement of the price in the deed was supported by evidence that the money had been counted over and paid; but the Court required evidence that it was not a sham but a real *bonâ fide* payment. In the other case, a bill was produced as evidence of the debt, but being *inter conjunctos* it was held necessary to prove it otherwise.

CAUSE OF GRANTING, cont'd.

The cause of granting is frequently involved in a series of transactions, complicated it may be, and which cannot be perspicuously exhibited without a careful and articulate recital. This must of course vary according to the circumstances; and it is here that a Conveyancer will mainly reap benefit from his general education. His knowledge of language and of the precise import of terms—the skill, acquired by study and confirmed by practice, in the art of composition, together with logical discrimination—these will all be efficient aids in enabling him to give a lucid narrative, free from terms of obscurity, and so constructed as to make all clear, and yet give prominence to what is chiefly important. Prolixity, and the introduction of unnecessary matter, should be carefully avoided, and brevity and conciseness studied, in as far as consistent with the distinct expression of everything essential. It is scarcely necessary to add, that rigid accuracy of statement is indispensable, and that the least variance with truth, either directly or by equivocation, will be fatal. The law, enforced by the interests of men, is too clear-sighted an interpreter to be deceived by that which, although literally true, is essentially false. It acts upon the maxim, "*Qui hæret in literâ, hæret in cortice*;" and is not content with going only skin-deep into the subject of examination, but lays bare and open the inmost discoverable parts of the true

matter. Deeds of a tortuous character are most likely to occur in matters involving the interests of a third party not cognisant of the transaction, and in which the truth must be violated, tampered with, equivocated or concealed, in order to attain the end in view. The first appearance of such a character in a transaction is of course the signal for withdrawing from it to the practitioner who respects himself and his profession.

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3. *The Act of the Granter.*—The next part of the deed is that which contains the act of the Granter—as his obligation in a bond, or his conveyance in a disposition. This must be clearly expressed, and it must contain everything that is necessary distinctly to define the subject of the deed, as the precise nature and extent of the obligation, or of the thing conveyed. Ambiguity or insufficiency of expression here may be productive of very serious consequences, and there will be enough to regret, although the irritation and expense of a law-suit should be the only evil result. The advantage of explicitness here is shewn by the case of *Fraser v. M'Donald*, 20th 1 S. 223. December 1821, where a sum assigned was described first as £1200 of the capital stock of the Bank of Scotland, and afterwards as £1200 sterling, and a litigation ensued to determine, whether the thing assigned was so much stock, or so much money sterling payable out of that stock. A striking example of the serious effects that may result from imperfect description of the subject conveyed, is afforded by *Livingstone v. Clark*, 31st May 1821. Here a party possessing 1 S. 44. two contiguous properties, held by separate titles of different superiors, built a dike cutting off 300 acres from the one, and adding them to the other. He then sold the property to which the acres had been added, declaring the dike to be the boundary; and he afterwards sold the other property described as in the titles, and without mention of the 300 acres or of the dike. In a question between the purchasers, it was held that the feudal title to the 300 acres was in the second purchaser. These cases sufficiently illustrate the general point which I desire to explain at present, viz, the necessity of a correct definition of the thing undertaken or conveyed.

The clause or part containing the act of the granter, contains also the name of the grantee—the person in whose favour the deed is made; and his designation will either be inserted here or ascertained by reference to a previous part. The name and designation of the grantee is an essential requisite. We have already seen the disastrous consequences of vitiation in part of the name of a disponee in the case of *Kedder*, where the deed was reduced, although the name was inserted entire in the testing clause; and similar consequences resulting from vitiation in the designation of the first heir-substitute under an entail in the case of *Shepherd*, where also the deed was reduced, and at a distance of eighty years from its date.

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supra, p. 126.

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CHAPTER III.

I. PERSONAL
WARRANTICE.

4. *Clause of Warrantice*.—The next point proper for consideration here is the subject of warrantice, which applies to all deeds of conveyance. Warrantice is an obligation by the granter of a deed, that the subject conveyed shall be secure and effectual to the grantee, and that, in the event of its being evicted by any one having a better title than is conferred upon the grantee, the granter shall make it good to him. This obligation is either implied or expressed—where not expressed, the extent of the warrantice, *i.e.*, the degree in which the granter is bound to make up or warrant the matter conveyed, is regulated by fixed rules of law, which impose different degrees of liability according to the nature of the subject. The rules by which implied warrantice is regulated are the following:—

WARRANTICE
IMPLIED IN
GRATUITOUS
DEEDS.

(1.) In *gratuitous* deeds, the warrantice implied is merely that the granter shall not afterwards grant any deed prejudicial to the gift—with this qualification, that he may, notwithstanding, grant a deed, which he was previously under an obligation to execute; for a gratuitous conveyance transfers the subject simply as the granter possesses it, and no warrantice, therefore, is implied against either previous deeds, or acts, or their consequences. The distinguishing character of the warrantice of gratuitous deeds then is, that it secures the grantee against future deeds inconsistent with the grant.

WARRANTICE
OF TRANSACTIONS.

(2.) The next kind of warrantice is the warrantice of transactions, as it is called by Erskine—that is, where the deed is not gratuitous, but the consideration is not commensurate with the subject conveyed, being the result of compromise or arrangement. In such cases, the warrantice is, that the granter has done, and that he shall do, no act inconsistent with the grantee's security. It differs from the warrantice of gratuitous deeds, inasmuch as it applies to past as well as to future deeds.

WARRANTICE
IMPLIED IN
SALES FOR ADE-
QUATE PRICE.

(3.) The next degree of warrantice is absolute, or, as it is expressed in the ordinary style, warrantice against all mortal, or against all deadly. This is implied in all sales for an adequate price; and the import of it is, that the seller warrants the title to be free of all defects prior to the grant. In the language of Stair, *vendidit* imports absolute warrantice, because it implies that an equivalent price was paid.

WARRANTY.

Warrantice may apply to the quality of the subject contracted about—as in the sale of a horse, where an adequate price imports implied warrantice against unsoundness and vice, and in a lease of subjects for a particular purpose, in which there is implied warrantice, not only that the possession shall be secure, but that the subject shall be fit for the purpose—for instance, that a dwelling-house shall be wind and water tight; or the warrantice may relate only to the security of the possession or sufficiency of the title. The latter is the warrantice in conveyances of lands and of debts. In these,

therefore, absolute warrandice, which is the highest personal warrandice, infers that the granter is to guarantee the right as unquestionable. So in a sale of lands, absolute warrandice is warrandice against all defects of title and means; "I, the seller, become absolutely bound, that this conveyance shall secure to you, the purchaser, a legal right to the lands conveyed." But this is no security against any *damnum fatale*, whereby the subject itself may perish or be deteriorated, and if the land or house sold is destroyed by an earthquake or by fire, or by volcanic eruption, as happened to *Herculaneum* and *Pompeii*, the loss is to the purchaser, who buys with all such risks, and has no recourse against the granter for damage of this description, on the ground of warrandice implied or expressed.

When the warrandice of a deed is not left simply to the determination of the law, but is expressed in the writ, its import and extent are regulated by the terms used:—

First, There may be a general obligation upon the granter to warrant the right, without specifying to what extent; and the effect of this clause is simply to leave the matter to be regulated by the legal rules in the same way as if there had been no warrandice expressed; for general warrandice is held to import that kind which is implied in the nature of the deed. To this general rule, however, it is now an exception, that in the transference of lands the general terms, "I grant warrandice," import absolute warrandice, whatever may be the circumstances of the transaction.

Secondly, When the warrandice expressed is not general, but intended specially to define the degree of the granter's obligation, it will be either—

(1.) *Simple*, which is the warrandice proper to gratuitous deeds, whereby the granter conveys all right he has to the subject, and engages that he shall not do any act prejudicial to the right. This, we have seen, is no protection against the granter's prior deeds, or against future deeds granted for causes antecedent to the conveyance; but posterior deeds inconsistent with the grantee's right are fraudulent.

(2.) Or the warrandice may be *from fact and deed*—that the granter has not done, and that he will not do, anything hurtful to the grantee's security. This is the warrandice implied in transactions, and it does not guarantee the subject as free from defects, but only that it shall be secure from all past or subsequent acts of the granter. It is sometimes so expressed as to secure the grantee also against the acts of the granter's predecessors or authors. This is the warrandice generally expressed in assignments of debts, even when the full amount is paid; but in this instance, as we shall presently see, it includes, or is not exclusive of, a higher implied warrandice applicable to such transactions.

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COM^d.

WARRANDICE
EXPRESSED.

SIMPLE WARRANDICE.

WARRANDICE
FROM FACT
AND DEED.

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ABSOLUTE
WARRANTICE.

(3.) The highest kind of personal warrantice is that which is called *absolute*, and binds the granter to warrant the deed at all hands and against all mortal. This is the warrantice proper to all deeds granted in return for a full price or other adequate consideration; and we have seen that its effect is not to guarantee the permanency of the subject conveyed, but to make the granter responsible that no title shall appear, which will prevail against that conferred upon the grantee, and that the subject, or any part of it, shall not, therefore, be evicted. This liability arises upon eviction by reason of any defect in the title, whether caused by the acts of the granter and of his predecessors, or arising from any other cause. But it is only defect in the *title* which raises the liability, and no warrantice is incurred by inevitable loss arising from causes independent of the title. The purchaser takes the subject, as we have seen, with all its inherent natural risks; and so deeply is this principle held to enter into transactions, that warrantice expressed in the strongest terms will not be held by the Court to embrace the case of *damnum fatale*. This is shewn in the case of *Dunipace v. Lawrieston*, 8th March 1636, where lands being warranted as worth so much a year, no liability was held to be incurred, although the rental sunk below the amount specified, the decrease having been occasioned by a general famine.

M. 16581.

WARRANTICE
debitum subesse IN ASSIGNATIONS OF
DEBTS.

We have already adverted to the warrantice of assignations of debts granted in consideration of full payment, which, according to the ordinary practice and expression, is from fact and deed done or to be done. The implied warrantice in this class of transactions is, according to Erskine, *debitum subesse*—that there is a debt; but this does not import that the granter guarantees the solvency of the debtor. According to the ancient practice it was otherwise, and absolute warrantice in an assignation of debts was held to import that the debtor was sufficient and responsible; and, in case the money could not be recovered from the debtor, the assigner was liable in warrantice to make it good. This is distinctly stated in Fountainhall's report of an anonymous case of date 13th February 1671, which concludes:—"But now of late the Lords have found, in several cases, it" (*i.e.* absolute warrantice in an assignation) "signifies no more, but that "no other body has a better right to that sum than I have, and consequently you who are my assignee; and that it is a true debt." A close attention to the nature and principle of warrantice in conveyances of lands and debts, as relating to the title and not to the qualities of the subject warranted, will shew, that the rule latterly adopted is correct, and that the warrantice of assignations as thus regulated is precisely similar in nature, and equal in extent, to the absolute warrantice of sales of land. The latter imports, as we have seen, that the title is unchallengeable,—that by virtue of it the granter shall have right to the subject,—and that the subject shall

2 Br. Supp.
519.

not be evicted from defect in the title ; but it does not import that the subject is imperishable, or incapable of deterioration ; and as the warrandice of assignments imports that there is a debt, and that the assignee shall have the best right to it, this warrandice is manifestly equivalent to the absolute warrandice of sales, although it does not imply liability through the debtor's insolvency, that being a risk not dependent on the sufficiency of the title, but inherent in the nature of the subject. Warrandice, in the words of Lord Stair regarding infestments of property, relates to the point of right, and not to the matter of fact ; and the clear perception of that distinction will dis-embarrass the subject of many difficulties. In accordance with the principles now stated, a clause of absolute warrandice in the assignation of a debt has repeatedly been found not to imply that the granter guarantees the solvency of the debtor, but only that a debt exists, and that the assignation gives a good title to it ; *Hay v. Nicolson*, 16th June 1664 ; *Barclay v. Liddel*, 24th November 1671. The judgment in the latter case, which was tried with great care and deliberation, states the rule explicitly, it being there found that a clause of absolute warrandice does not import that the debtor is responsible at the time of the assignation, but only that *debitum vere subest*, and that the bond, decret, or other deed assigned, is such as can never be reduced, and that the cedent hath the undoubted right to that debt, and no other person, so that the debtor being pursued can never defend in law. The same decision was pronounced in *Liddel v. Barclay*, 12th December 1671, although the granter in this case warranted the sums transferred to be "good, valid, and effectual," these words being held to mean only that the sums were truly due, and not to import the solvency of the debtor ; and the rule applies even although there be transferred along with the debt, by the assignation containing absolute warrandice, heritable security for it acquired by diligence. It was so found in the cases of *Fyfe v. White*, March 1683, and *White v. Fyfe*, November 1683.

When warrandice is not left to be regulated by the operation of the law, but is expressed in the deed, then the warrandice will be of the kind expressed, according to the rule that express warrandice prevails over that which is implied. The subjects conveyed by gratuitous deeds, therefore, may be secured by higher warrandice than simple, if the granter think fit. Of this we have an example in the gratuitous disposition by a husband to his wife of the liferent of his heritable estate, which he had burdened with £3500. The question arose, whether the wife was entitled to the full liferent, or only to the balance of the rents after deducting interest of the debt. It was ruled, on the authority of Erskine and of the case of *Coventry v. Coventry*, 8th July 1834, that the disposition of the liferent being accompanied by an obligation of absolute warrandice, the widow was

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CONS^d.

EXPRESS WAR-
RANDICE PRE-
VAILS OVER
IMPLIED.

Inst. ii. 3. 27.
12 S. 895.

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13 D. 548.

WARRANTICE,
cont^d.

M. 16623.

6 S. 818.

entitled to the full liferent, without deduction on account of the debt ; *Strong v. Strong*, 29th January 1851. On the other hand, if the grantee of an onerous deed is satisfied to take his title with warrantice from fact and deed only, the granter's liability will be restricted accordingly, notwithstanding his receipt of a full consideration. Therefore, if lands are sold with warrantice from fact and deed only, and eviction ensues upon grounds not imputable to the disposer, he is not liable in warrantice, nor is he liable to repay the price, for the sale was a sale only of such interest as he had in the lands. It was so found in *Craig v. Hopkin*, January 1732. As implied warrantice is excluded by what is written, so where a party purchases under a written contract which throws the risk upon himself, he abandons all claim of warrantice, and limits his right to this, that the granter is not entitled to make any subsequent deed inconsistent with the grant. Notwithstanding the rule that express warrantice prevails over implied, it is settled that warrantice from fact and deed in an assignation of a debt does not exclude the implied warrantice *debitum subesse*. This was found in a case to which we have already had occasion to refer, and which presents a very striking example of the effect of the implied warrantice of assignations of debt; *Ferrier v. Graham's Trustees*, 16th May 1828. In this case it will be remembered, that bonds had been granted for money lost at play, assigned by the holder, and found null under the Statute of 9th Anne against gaming. The assignation contained warrantice by the granter from "all facts and deeds done or to be done by me in prejudice hereof." In an action against the granter, it was found, in terms of the Lord Ordinary's judgment, that this warrantice "is the usual warrantice recognised by our law in the transference of *nomina debitorum*, and that it imports *debitum subesse*." Although the Court adhered to this interlocutor, which assumes that the implied warrantice is embraced in the expressed warrantice from fact and deed, it will be found that the Judges rather regarded it as a case resting upon the implied warrantice as well as the expressed. Lord GLENLEE said:—"The warrantice expressed left the warrantice implied from the nature of the transaction untouched. The general rule is, that when a debt is assigned, there is implied the warrantice *debitum subesse*;" and the same view was taken by the other Judges.

MEASURE AND
EFFECT OF
WARRANTICE.

F. C.

The effect of warrantice is, that after eviction of the subject the grantee has a claim against the granter for the full damage which he has sustained. An excellent example of the practical operation of warrantice will be found in the case of *Downie v. Campbell*, 31st January 1815. Here the heir in possession of an entailed estate granted a lease to commence eight years after its date, with absolute warrantice. Before the commencement of the lease the granter of it forfeited his right to the estate by contravening the entail, and the

next heir having repudiated the lease, which thus became ineffectual, the granter was found liable in damages to the tenant. And it is exhibited in another form in *Briggs' Trustees v. Dalyell*, 12th December 1851. Lands and teinds were here sold for a full price, and warranted. The purchaser was obliged afterwards, however, to pay the price of the teinds to the crown, whereupon the seller was found liable to indemnify the purchaser in terms of the obligation of warrandice. Repetition of the price, in the case of a sale, will not be held to satisfy his claim arising upon eviction, for, as the grantee took the risk of loss by depreciation when he purchased, so he must have the benefit of enhanced value. In the case of irredeemable conveyances of lands, therefore, the warrandice subjects in payment of the value at the date of eviction, and it was so decided in *Livingston v. Lord Napier*, 7th February 1777. In redeemable and personal rights, the measure of the warrandice is the sum actually paid.

Warrandice is *stricti juris*, and, whether expressed or implied, it will not be extended by surmise or implication. Therefore, warrandice of a disposition of lands from fact and deed, and particularly against an infeftment in favour of Janet Miller, was held not to infer warrandice against an infeftment in favour of a party of a different name; *Ogilvie v. Leslie*, 2d February 1715; and a grant of permission to carry off all the spring water on a farm was held not to imply warrandice, that the water should be available in a certain way not specified; *Reid v. Shaw*, 21st February 1822. It follows also from the strict interpretation given to warrandice, that the obligation does not arise unless eviction takes place; and where a party, therefore, had successfully resisted an attempt to evict the subjects warranted, he was found to have no recourse against the party warranting for the expense of defending the right; *Inglis v. Anstruther*, 26th February 1771. In the judgment in this case it was given from the Bench as an illustration of the same doctrine, that, although an heir-at-law pursued for a moveable debt has relief against the executor, yet, if he is assoilzied, he will not recover from the executor the expenses he has incurred in the action. This rule results, it will be observed, from the import and terms of warrandice, which do not imply that the grantee's right shall not be attacked, but only that, if attacked, it shall not be found defective.

Consenters to deeds are not liable in warrandice, because their interference is merely permissive, at the request of others, and not for their own benefit.

It has sometimes been doubted, and not without reasonable cause, whether the insertion of warrandice in deeds be not too commonly practised, and without adequate cause or benefit, seeing that the rules of law for supporting them by implied warrandice are distinct and authoritative. The advantage does not appear, of taking from a seller

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14 D. 173.
WARRANDICE,
contd.

WARRANDICE
IS STRICTI JURIS.

M. 4154.

1 S. 334.

M. 16633.

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WARRANTICE,
CONT^d.

an obligation in direct words to do what he would be equally bound to do by merely granting the deed of transfer, the implied obligation being as stringent in its nature as that which is expressed, equally prompt in its effects, and not less extensive in its consequences. Expressed warrantice, however, is necessary in those cases in which it is intended that the obligation shall be different from that which is legally implied in the nature of the deed,—as, when it is intended to render a gratuitous deed more secure, by inserting absolute warrantice, or to restrict the warrantice upon a sale, so as not to be absolute but from fact and deed only.

II. REAL WAR-
RANDICE EX-
PRESSED.

Hitherto we have spoken only of *personal* warrantice, the value of which depends upon the means of the granter. There is another kind of warrantice, by which one subject is made to secure or warrant another, and this is called *real* warrantice. The term is used in relation to heritable rights only, and it occurs in two cases, one of which is of the nature of expressed warrantice, and the other is in a sense implied. Real warrantice is expressed, when, from the want of sufficient personal warrantice or any other cause, there are conveyed along with the lands sold other lands, which are thus impledged or made a security for the sufficiency of the title to the lands sold. In such transactions the lands actually sold are called the principal lands, and the lands conveyed in fortification of the title are called the warrantice lands. The latter are merely a security in the first instance, and the disponee has no right of property in them until the principal lands have been evicted, and a decree obtained declaring that the warrantice has been incurred. Real warrantice is implied in an excambion—which is a mutual conveyance of lands by two parties, each disposing lands belonging to himself in favour of the other, the consideration being, that by the same deed each acquires lands of equal value from the other. The warrantice implied in this transaction is, that in the event of the lands acquired by either party being evicted, he and his heirs and successors are entitled to resume the lands disposed by himself. In Lord Stair's words, they "have regress" to those lands. This right and the corresponding liability remain with the successors of both parties, whether they be heirs or disponees, and the warrantice arises by the mere operation of the law, provided the deed clearly shew that the transaction was an excambion, a real right of security or warrantice being thus created to each party over the lands disposed by himself, which is preferable to all subsequent deeds affecting the same lands. The following cases afford illustrations of the real warrantice created by an excambion; *Melross v. Ker*, 25th November 1623; *Wards v. Balcomie*, 14th July 1629.

REAL WAR-
RANDICE IM-
PLIED.

i. 14, 1.

M. 3677.

M. 3678.

REGISTRATION
OF DEEDS.

5. *Registration of Deeds*.—The next part common to most deeds is

the clause of Registration. This is a subject of great practical importance, and some attention bestowed upon it will aid our general conception of the principles of Conveyancing in Scotland.

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In order to obtain a correct idea of the object and effect of the clause of registration, let us consider for a moment what course would be taken, in the absence of that clause, by a party holding the written obligation of another, in order to obtain fulfilment of it. He holds the obligation, but if performance is refused, it is manifest that he cannot of his own authority, or by his own strength, enforce it; he cannot himself attach the person or property of his debtor. These are sacred from private violence, however just may be the claim, and the law which protects them will not suffer them to be interfered with, except by its own authority, and when that authority is granted it can be exercised only by the public officers of the law. This all proceeds upon the obvious principle, that individuals cannot be allowed to judge, or to execute the law in their own cases without inevitable confusion and anarchy. In order, therefore, to obtain implement of a written obligation, it was obviously necessary, when performance was withheld, to take the same steps as were requisite in any other question or dispute. The matter was brought before the judge, the obligation was produced in support of the claim, and after the grantor of it was heard in defence, if he had any defence, and if he had no defence, or if that proposed was found insufficient, then the judge's sentence or decree was pronounced, ordaining performance by the party in terms of his obligation. Upon that decree being issued, it would be enforced by the officer of the law in accordance with prescribed forms. Such, according to every reasonable probability and analogy, was necessarily the mode of obtaining implement of obligations by order of law in early times. But it was dilatory, troublesome, and expensive, and as the difficulties thus encountered in obtaining performance must have operated directly as a discouragement to the negotiations and contracts required in commerce, and ordinarily in men's private affairs, ingenuity would be stimulated to devise means by which the legal forms of obtaining performance might be rendered less costly and tedious. The creditor would require, as a condition of his transaction, that he should have the means of promptly recovering his advances, and the desire to procure the accommodation would dispose the debtor to concur in giving such facilities as could, consistently with the requirements of the law, be granted. Of this species of arrangement for mutual convenience we find a precise example in the Law of England, where from a very early period it has been customary for debtors to agree to allow judgment to go against them, either by not pleading, or by appearing and confessing the plaintiff's demand to be just. This is done in a formal and systematic way, it being usual, in order to strengthen a creditor's security, for the debtor

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contd.

to execute what is called a warrant of attorney to some nominee of the creditor, empowering him (in the words of the English practice) to *confess a judgment*—that is, to consent by silence or by express acquiescence, that judgment be given in favour of the creditor in an action of debt to be brought by him against the debtor for the specific sum due, which judgment, when confessed, is absolutely complete and binding. Thus the judicial forms are observed, but they are made by the consent of parties more readily and cheaply available to give legal effect to their engagements. That the provisions of the Scotch law as now administered had their origin in proceedings precisely analogous to the concerted method practised in England, there does not appear to be any reasonable cause of doubt. The similarity of the device for obtaining the judicial sentence is indeed remarkable. In England, the debtor names an attorney to appear and confess the justice of the claim. In Scotland, by the clause of registration the debtor consents that the deed be registered in the books of the Lords of Council and Session or in other Judges' books competent, in order that a decree may be interponed, and that execution may follow upon the decree; and he grants a mandate or procuratory, which is an authority to the mandatory or procurator to consent that the deed be registered and a decree issued with a view to execution or diligence. Upon production of the deed containing this mandate at the register, it is recorded, and an extract given out as a matter of course without the appearance of parties or the intervention of a judge, and the extract is equivalent to a sentence upon which immediate execution may follow. The ancient history of the clause of consent to registration does not appear to have been traced yet with sufficient minuteness. But Mr. Ross in his lecture upon the subject has thrown sufficient light upon it to shew, that Mr. Erskine is too little regardful of the origin of our system of registration for execution, when he treats of the registers for this purpose as if they had been primarily a separate institution distinct from the books of the Court of Justice. Although we cannot exhibit in detail the precise steps by which the existing practice gradually attained its present form, the statutes and authorities contain expressions and indications sufficiently significant to leave no doubt that the modern extract of the registered deed, which contains indeed the substance and efficacy of a judicial decree, is merely the counterpart of the ancient judgment, pronounced after all the forms of a judicial process between the parties had been gone through. Before the Reformation, the policy of the churchmen, drawing civil matters within the precincts of the Ecclesiastical Courts, had laid the foundation for the modern procuratory. They took from parties engagements of submission to the Church Judicatories in relation to their civil contracts, and thus the consequence of failure to fulfil such contracts was the censure and

Inst. ii. 5, 54.

excommunication of the Church followed by civil pains and penalties. Of this early form of diligence there are distinct records in the Acts 1449, cap. 12; 1535, cap. 9, and 1551, cap. 7, all attaching high temporal penalties to those who, failing to perform the sentences pronounced against them, continued to lie under the Ecclesiastical censure. Until the period of the Reformation there is reason to believe that the act of registration did not take place without the presence of a Judge. It is so stated by Sir Thomas Craig, and in the Statute 1584, cap. 4, which dispenses with sealing in the execution of deeds containing consent to registration, that formality is abrogated upon the ground that registration "is a greater solemn act than sealing"—an expression which obviously refers to the formality of the appearance of parties before the Judge, the one to crave, and the other to assent to, the decree of registration. By what precise steps that formality became modified does not appear, but there is clear evidence that long after 1584, an extract or decree of registration could not be obtained without an express consent by a procurator on behalf of the granter of the deed. The name of the procurator was, and still continues to be, left blank in the deed, and to be supplied in the extract by the officer who makes the extract; but it was customary for an advocate to subscribe his consent as procurator for the granter before an extract could be given out. This we learn from the Act of Sederunt, 9th December 1670, whereby the Lords authorized the Lord Register and Clerks of Session to register bonds, contracts, and other writs, and insert the consent of advocates as procurators to the registration, and to give out extracts thereof, notwithstanding that the advocates do not subscribe their consent. We have thus seen enough to conclude that the expedient of registering deeds in order to execution, i.e., to enforce performance of obligations, is not to be viewed as an original device, but as a system growing naturally and directly out of the ordinary forms of court in the administration of justice. And this view is useful in giving us a correct notion of the purpose of registration, and the conveniences connected with it. It is a means of obtaining the ultimate object and effects of a legal process, viz, a judgment and execution, and that without litigation and without any process, retaining at the same time every element that is necessary to stamp the procedure with a just and equitable character. There is not the appearance of the party before the judge or his pleading, but there is what is equivalent, viz, his consent that sentence shall go out without these, and there is the sentence founded upon, and indeed embodying, the very act and admission of the party as contained in his deed, and ordaining him judicially to do that which he has already voluntarily obliged himself to do.

The particular steps of execution or modes of enforcement, which may follow upon the authority of the judicial decree contained in the

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CONT^d.

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extract of a deed, will be shewn afterwards, when we come to treat in detail of the enforcement of obligations. At present, our remaining remarks will be confined to points connected with the history and general import and effects of the clause of registration.

REGISTRATION
FOR EXECUTION,
CONS^d.

We have already seen, that the clause consists of a consent to registration and execution, with the procuratory subjoined, in which the name of the procurator is left blank. Formerly, there was subjoined to the nomination of the procurator a full statement of the purpose of his appointment and of his powers. Since the Act of Sederunt 1670, however, by which registration and the giving of extracts without the written consent of the procurator was authorized, the statement referred to has been entirely omitted, the purpose of the nomination being sufficiently indicated by the juxtaposition of the consent to registration. This abbreviation of the procuratory affords an explanation of the &c. which is usually and correctly written after the word *procurators*.

PROCURATORY
FOR REGISTRA-
TION DOES NOT
FALL BY DEATH
OF PARTIES.

The convenience and usefulness of the registration clause was increased by the statutes passed in order to exempt it from the operation of the maxim of law, by which a mandate becomes void upon the death of the mandant who grants it, and of the party for whose benefit it is granted. The application of that rule to the procuratory in the clause of registration was found to be attended with great inconvenience, as it became necessary, upon the granter's death before registration, to institute an action of registration at the instance of the grantee or his heir against the heir of the debtor. Mr. Erskine holds that the principle in question, viz, the termination of a mandate by the death of the granter, is properly applicable only to the cases where the mandate is given for the benefit of the mandant, and that, as in this instance it is granted exclusively for the benefit of him to whom the deed is delivered, it ought not to have fallen by the death of the granter. There is no doubt, however, that such was the effect of the granter's death. We may refer on this point to the case of *Channell v. Seton*, 16th February 1693, which illustrates also the true character of registration for execution, the ground of the decision being, that registration was a decret of consent, which required *actor et reus* (a pursuer and defender), and here the *actor* was dead, so that there could be no decree at his instance. This was the case of the death of the receiver of the deed, and the principle of the judgment applies *à fortiori* to the death of the granter, for if a judgment is incompetent at the instance of a deceased pursuer, it is still more incompetent against a deceased defender. The suggestions made from the Bench in this case appear to have led to the enactment of the statute 1693, cap. 15, which authorized the registration of writs after the death of the creditor at the instance of his heir executor or assignee upon production of a service, retour, confirmed

M. 839.

1693, c. 15.

testament, or assignation. Although this Act requires the production of a title by the party who applies for registration after the creditor's death, such production has now by immemorial and universal practice become unnecessary, and deeds are registered upon being presented, without production of any title or other authority. The facility granted by the Statute above referred to was, three years afterwards, extended to the case of the death of the granter of the deed, as well as of the creditor, by the Act 1696, cap. 39, which declares that all bonds, dispositions, assignations, contracts, and other writs registrable, may be registrate after the granter's death as effectually as before.

The consent to registration in the books of a particular Judge implies merely consent by the granter of the deed that execution shall follow upon registration in that Judge's books; but it does not infer a prorogation of the jurisdiction of the judge named—that is, an agreement that he shall judge and decide in any questions which may arise regarding the deed registered.

Registration for execution is a proceeding so important, and involves consequences so serious against the property and person of the debtor, that it cannot take place except by his own express consent; and, therefore, registration in order to diligence was refused upon a deed containing merely a procuratory without a consent to execution; *Erskine*, 27th July 1710. But the privilege of registration in order to diligence is extended by special statutes, as we shall afterwards see, to bills and promissory notes, the acceptance and subscription of which imply consent to registration for execution.

By inveterate usage the ordinary duration of a charge—that is, the period of time which must elapse after a judicial demand for payment or performance upon a registered decree, before further steps can be taken to attach the person of the debtor, or make his property immediately available—was, until recently, fifteen days, and anciently this period was invariable. The first instances in which it was abridged were charges given to the Earl of Huntly and his son in 1562, and afterwards to the parties concerned in the murder of David Rizzio, who were all charged to appear within six days—a precedent which, although concerning a criminal matter, was extended to civil execution. So, by universal practice, in all deeds which by their nature are proper for enforcement by diligence, the clause of registration contains an express consent to execution upon six days' charge. Without such consent the debtor was entitled to the charge of fifteen days, which is now limited by 13 & 14 Vict. cap. 36, § 21, to fourteen days in charges upon signet letters. But the charge upon bills and promissory notes is by statute limited to six days.

Hitherto we have spoken only of registration, where the purpose is execution; and it is to this department alone of our system of registration ; and it is to this department alone of our system of registration

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DURATION OF
CHARGE UPON
DECREES OF
REGISTRATION.

REGISTRATION
OF PROBATIVE
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PRESERVATION.

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TION.

tration, that the remarks apply by which it is shewn not to have sprung into existence as an original expedient, but to have been founded in, and gradually and naturally to have grown out of, the ordinary judicial procedure for determining disputes and enforcing the decision. The privilege of registration being confined at first to such deeds as contained a clause of registration, provision was made by the Act of William and Mary, 1698, cap. 4, for registering writs not containing that clause. This Act makes it lawful to register for *conservation* charters granted by subjects, dispositions, bonds, contracts, tacks, reversions, and all other probative writs. It appoints the principal writ to be given back to the party, and ordains that the extract shall make entire faith in all cases, in the same manner as if the writs had been registered by virtue of a clause of registration, except in the case of improbation—that is, in an action challenging the writ as not genuine or authentic.

REGISTER OF
PROBATIVE
WRITS.

The general register, instituted in pursuance of this statute, is separate from that of deeds containing clauses of registration. It is called the register of probative writs, and it is not limited to formal deeds, but writs of any description, of which parties desire to preserve the tenor, are entered in this register. This registration, however, gives no power of execution. Its purpose is preservation alone.

REGISTRATION
FOR PUBLICA-
TION.

There is a third great purpose, in addition to execution and preservation, which is attained by another class of registers; and that is *publication*. The design of this department is to give notice to the lieges. The writs to which it chiefly applies are those connected with heritable rights, and, by examination of the registers, any one who is about to purchase, or to lend money on the security of land or other heritable property, may ascertain, whether the party with whom he is in treaty possesses the property unburdened, or whether it is affected by mortgages or other burdens or claims. This important and most beneficial object is attained by a variety of registers.

REGISTERS OF
SASINES.

1617, c. 16.

(1.) There are registers of sasines which, after various imperfect enactments during the sixteenth century, were at last established upon a satisfactory system by the Act 1617, cap. 16. These contain the instrument by which a party's title to heritable property is completed—the instruments by which debts are secured upon such property—the discharges of such debts—and judgments of the Court operating as discharges or in any other extraordinary manner affecting heritable property.

REGISTER OF
ENTAILS.

(2.) There is the register of entails, by which heritable property is placed in a large degree *extra commercium*, the successive occupiers holding it under fetters which preclude them from the ordinary legal powers of sale and contracting debt.

REGISTER OF
INTERDICTIONS.

(3.) There is the register of interdictions, by which, as we have seen, a proprietor of heritage limits his own power of alienation.

(4.) There is the register of adjudications, which shews the judicial transfers of heritable property made by the operation of the law. PART I.
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REGISTERS OF
INHIBITIONS.

(5.) There are the registers of inhibitions, shewing the diligence used by creditors to restrain the debtor from alienating his heritable property in defraud of their claims.

(6.) There is also a register for inventories, made by such heirs as deem it prudent to enter upon their ancestors' succession without incurring a universal liability for his debts. This register, however, is now practically superseded by the Service of Heirs Act, 10 & 11 Vict. cap. 47, which provides for the same effect in the services, and for the registration of the decrees of service in Chancery. REGISTER OF
INVENTORIES.

10 & 11 Vict.
c. 47, § 25.

The important aid afforded by these registers in ascertaining the title to heritable properties, and testing their freedom from encumbrance, is sufficiently obvious; and it is here chiefly that the peculiar character and advantages of our system of registration appear. The principle of it is, that the condition of all heritable property as regards its ownership and encumbrances is public, and may be ascertained at any time by any person who desires the information. Nor does it appear, that any system could be devised, better adapted for giving security to land rights, and to landowners the benefit of the confidence resulting from a full and clear exposition of their title, and of the extent or absence of debt. The benefits of the system are commonly recognised, although certainly the institutional writers of the English Law do not appear clearly to perceive or adequately to appreciate them. The only registers for real property in England are in the counties of Middlesex and York, and conveyances of lands forming part of the great level of the feus must also by statute be registered in the Bedford Level Office. It appears from the statement of Blackstone, that very numerous disputes were occasioned, by the inattention and omission of parties, in the use of the Middlesex and York registers, and Mr. Burton, in his "Compendium of the Law of Real Property," considers the present system of conveyancing in England unsuitable to the use of registers on account of the complication of instruments, which he thinks must render abortive all attempts to raise the certainty of a good title beyond a high degree of probability. Instead, therefore, of the absolute or mathematical certainty, as he terms it, derived from the use of registers, the security of the title in England rests on the moral certainty derivable from negative evidence of intestacy, and the presumptions arising from the possession of the land and of the title-deeds—from the character of the vendor and his agents—and from general reputation. In Scotland, the simplicity of our conveyances exempts us from the difficulty connected with the complexity of the English system, and our practice has by long use blended our conveyancing and our registration into a method harmo-

ADVANTAGES
OF REGISTRA-
TION FOR
PUBLICATION.

Blackstone, vol.
ii. p. 435, 23d
Edⁿ. by Stewart.

p. 199, 8th Edⁿ.
See also Wil-
liams' Law of
Real Property.

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LOCAL
REGISTERS.

nious and practicable, and of the highest public utility. No system can attain to absolute certainty, but we are probably warranted in believing that that which we enjoy brings us as near to certainty as it is possible in such matters to attain.

The system of registration in Scotland is diffused over the kingdom by means of local registers. In every county there is a register of deeds and probative writs; and execution within the sheriff's jurisdiction is competent upon deeds, registered in the local register, which contain a consent to that effect, and also upon bills and promissory notes; and such execution may also take place beyond the jurisdiction by means of supplemental authority, as will afterwards be explained. There are also local registers in the royal burghs, in which it is competent to record protests of bills and promissory notes, and also dispositions, tacks, and other deeds relating to the burgage subjects, and generally deeds or instruments, in which all the parties are burgesses, or have a legal domicile within the burgh. It was formerly the practice to register deeds in the books of burghs of Regality and Barony, and also in those of the Commissary Courts; but these registers were abolished by the Act 49 Geo. III. cap. 42. There are also local registers for publication—those for sasines in districts not corresponding with the counties, but defined by the Act 1617—and in each county a register of inhibitions. These are the *particular* registers of sasines and inhibitions. And there is in each burgh a register of sasines for properties held burgage. The county registers of deeds and probative writs, and the burgage registers both of deeds and of sasines, remain permanently in their respective localities. The particular registers of sasines and inhibitions do not remain where they are written, but are transmitted to the General Register House in Edinburgh, agreeably to a regulation which enjoins the Keepers of the several public records, which are by law transmissible to the General Register House, to deliver the successive books or volumes of the records to the Lord Clerk Register or his deputies within three months after the completion of each volume. This regulation is contained in the 12th section of the Act 49 Geo. III. already referred to. By the same statute, in order to provide a check upon the careful formation and custody of the county registers, the Sheriffs and Stewards-depute or their substitutes are enjoined at least once a year to examine into the progress and state of the different records kept by the sheriff-clerks, and to report their condition and the state of the buildings containing the records to the Court of Justiciary, which is empowered to direct inquiries and to make orders. Copies of these reports are to be transmitted to the Lord Clerk Register, who can make summary complaint to the Court of Session in cases of neglect and malversation. A similar provision is made with regard to the burgh registers, which the chief magistrates are appointed to examine

and report upon to the Court of Justiciary, with a view to the same procedure and remedy.

Such is a brief sketch of the system of registration in Scotland. The general result of it, in its three grand branches, is—

(1.) That deeds and all other writings may be registered for preservation of their contents, either in the central register in Edinburgh, or in the provincial registers.

(2.) That all deeds, containing proper clauses of registration with consent to execution, as well as protests of bills and promissory notes, may be registered, for preservation of the originals of such writs, and also for execution, in the books of Council and Session, or in the registers of the subordinate Courts ; and

(3.) That all instruments and proceedings affecting heritable property must be registered in the registers for publication, so that the state of the title of all heritable property, and the debts and burdens affecting it, can be ascertained by inspecting the burgh register in relation to burghage property, and, with respect to all other property of a heritable nature, by inspecting the registers in the General Register House in Edinburgh, where the whole registers, general and particular, are ultimately concentrated.

In a matter of so great public interest, it cannot be out of place here to refer to the system of management, by which an institution so important and so extensive and complicated is conducted, and kept in its present satisfactory condition. It is quite evident that this could not be done without the most careful supervision. The charge and responsibility of superintending the public registers has, accordingly, from time immemorial been devolved upon a high Officer of State, under the title of Clerk-Register, or Lord Clerk Register, to whom, and to his deputy and the other officers appointed by him, it was assigned to see to the formation and custody of the National muniments—the Acts of the Scottish Parliament—Acts emanating from Royal authority—the acts and proceedings of the Supreme Courts, civil and criminal—and the registers which we have already described, as well as others which will afterwards come under our notice. From the earliest periods until the reign of Charles II., these public records were deposited under the custody of the Clerk-Register in the Castle of Edinburgh. Soon after the Restoration, a large portion of the records was removed to what was called the Laigh Parliament House, being the apartments now occupied by the Advocates' Library ; and this, from its proximity to the Courts, was found so convenient, that, shortly before the Union, the whole remaining records were transferred from the Castle to the same place, where they remained until the erection of the General Register House, which was completed in the year 1787, and has since received additions. The General Register House serves the two great purposes, *first*, of

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GENERAL RESULT OF SYSTEM OF REGISTRATION.

SYSTEM OF MANAGEMENT OF THE REGISTERS.

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contd.

securing the preservation of the National muniments and public records, and making them available for use ; and, *secondly*, of accommodating the whole offices of record connected with the Supreme Courts. Although it formed at one time a part of the duties of the Lord Clerk Register and his deputies to frame the records, their duties are now confined to those of control and custody. The formation of the general and local records is necessarily intrusted to a great multitude of individuals ; and it was, therefore, highly necessary that they should be subjected to an authority which should vigilantly watch over their proceedings, and prevent or correct laxity and error. The arrangement by which the *formation* of the records is committed to one set of officers, and the *custody* of them to another, is held to be founded upon a principle of great practical importance, as providing a check against carelessness, inaccuracy, and other defects. But, in order that the public may have the best security for the sufficiency of the public records, and their capability of preservation, the books are all prepared in Edinburgh, which secures their uniformity, and the good quality of the materials. And their integrity is guaranteed by a system of marking the pages of the volumes, before they are issued to the parties who are to form them, which is a security against mutilation and interpolation. The reports of the last Deputy Clerk Register, from which several of the statements now made are derived, evince the bestowal of great pains in the most minute particulars ; such as securing good penmanship, ink of the best quality, and sufficient binding,—all points of great importance where legibility, permanency, and good preservation are so essential. It is also of great importance to the public, that care is bestowed upon the arrangement of the records, so as to make them accessible without unnecessary difficulty ; for which purpose abridgments and indices are compiled, particularly periodical indices to the registers of deeds and sasines, whereby the difficulty and expense of making searches is materially lessened.

EXTRACTS OF
DEEDS ON RE-
CORD.

By the Act 1685, cap. 38, a writ given in to be recorded in the books of Council and Session, must be booked within twelve months from the date of ingiving. But, although the deed be not booked, extracts are given out immediately ; and by the same statute, a writ may be borrowed within six months after its ingiving, provided it has not been booked. It is competent to borrow a deed in this way, (although an extract has been given out,) for the purpose of correcting an error in the testing clause ; *M'Leod v. Cunninghams*, 20th July 1841 ; affirmed 13th August 1846.

8 D. 1288.
5 Bell's App.
210.

The principal deeds, which are retained in the register after being recorded, are preserved with great care, and are not permitted to be removed from the General Register House, unless in circumstances of absolute necessity ; and, if the place of production be within a reason-

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CHAPTER III.

PRODUCTION OF
DEEDS FROM
THE REGISTERS.

able distance, the Court will direct the deed to be produced under the custody of an officer of Court only. But the indispensable nature of the exigency must be proved ; and the Court will not allow a principal document to be removed, if certified extracts, which are probative by the Law of Scotland, will suffice. Sir Robert Spotiswoode in his *Practicks* has noted, that on 31st January 1627 a party was allowed to retire a bond out of the register, in order to pursue the debtor thereupon in Dantzic, because the extract would not make faith there. In *Cunningham*, 3d July 1821, a bond was given up to be sent to Jamaica, where the Courts will not admit an extract as evidence, upon caution being found for its restoration within a year ; and, in *Bloxam v. Earl of Rosslyn*, 13th January 1825, the specification of a patent was allowed to be removed for production in England, upon an obligation to return it within three months under a penalty of £300. But, in *Birtwhistle v. Lord Clerk Register*, 2d March 1825, the other Division of the Court (the First Division) refused to allow certain deeds to be removed to York, extracts being probative by the Law of Scotland ; and the same decision was given in *Morton v. Lord Clerk Register*, 17th December 1831. In that case, however, the production of the principal deed in England was not proved to be indispensable. In the following cases the Court authorized the production of the principal deed, upon evidence of its necessity, in the hands of an officer of Court ; *Gaywood*, 17th January 1828, where production was required in the Court of Session in Edinburgh ; *Annandale*, 29th February 1828, where warrant was granted to a Depute-Clerk of Session to take and exhibit a principal bond at Newcastle ; *Mansfield v. Stuart*, 30th June 1840, where the clerk of process was authorized to carry principal deeds, and exhibit them in a proof at Arbroath. In the case of *Duncan v. Lord Clerk Register*, 14th July 1842, the rule was again clearly recognised, that, although every precaution was to be taken to preserve recorded deeds, and the principal must be retained, wherever an extract will serve the purpose, yet if nothing but production of the principal will do, the records, which are intended for the advantage of those interested in deeds, must not be made the means of depriving them of their benefit ; and, accordingly, a recorded settlement being required for production in the East Indies, the Judges considered it out of the question to send an officer of Court thither, and ordained the deed to be given up upon security to return it within six months, and also upon an extract of the principal deed, duly authenticated, being lodged in its stead. On the same principle, when a process has been extracted, the Court will not allow the proceedings to be removed from the record, because certified extracts can be got ; *Monro*, 25th Nov. 1828. The report of this case cites the Acts of Parliament enabling parties to obtain certified copies of a process, or of any part of it. Another decision to the same effect is *Meikleham*, 30th Nov. 1839.

p. 272.

1 S. 98.

3 S. 428.

3 S. 602.

10 S. 162.

6 S. 363.

6 S. 657.

2 D. 1235.

4 D. 1517.

7 S. 52.

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2 D. 165.
THE BLACK
LIST.

It only remains to notice here a case of great interest and importance, involving the question, whether the register of deeds, besides being a register for execution, partakes also of the character of a register for publication. A society of bankers, merchants, and other traders, was formed in 1837, for the purpose of communicating to its members the information furnished by the public records as to the names of parties appearing upon protested bills and in other steps of diligence. This information was obtained by lists copied from the general and provincial records; so that, whenever a deed or the protest of a bill or promissory note, was recorded, the names of all the parties liable under it were immediately circulated in every part of Scotland, the object being to provide information for the use of the members as to the mercantile credit of the trading community, and to make the members acquainted with the names of persons in trade of doubtful credit. The circulation of the list containing this information was challenged by a party, whose name appeared in it as the granter of promissory notes protested for non-payment, but which he averred, that he had granted for the accommodation of another, and was able to retire, had he not had good reasons for not doing so. The opinions of the whole Court were taken, and it was decided by a majority to interdict the circulation of the list; *Newton v. Fleming*, 10th March 1846. This decision was, however, reversed on appeal, 17th February 1848, the House of Lords holding, that, as all the records are by statute made patent to the public, it is not libellous for a body of merchants to publish to each other the names appearing upon the register of protests; and that decrees of registration are equally open to the public, and may be equally published, with decrees pronounced *in foro contentioso*.

D. 677.
Bell's App.
75.

COMPONENT
PARTS OF
CLAUSE OF
REGISTRATION.

The clause of registration expresses, *first*, the granter's consent to registration; *secondly*, the books in which the deed is to be registered, which are generally in the comprehensive form of "*the books of Council and Session, or others competent*;" *thirdly*, the purpose of registration, which, if it is only designed to preserve the deed, will be "*for preservation*." If the deed is such that its obligations may be enforced by execution, then the purpose will be "*for preservation, and that all necessary execution may follow upon a decree to be interponed hereto in common form*." Where it is proper to have the power of execution upon six days' charge, the words "*upon six days' charge*," will be inserted after the word "*execution*." Where a chief object of the registration is publication, as in deeds relating to heritable securities, and which will be entered in the register of sasines, that purpose also will be expressed by adding the words, "*and also in the general or particular register of sasines, reversions, &c., for publication*;" and it may be noticed here, that deeds recorded for publication, like those registered as probative writs, are not

retained in the record for preservation, but are copied, and the originals returned to the parties. By 1617, cap. 16, extracts from the registers of sasines are probative in all cases, excepting those of improbation. The fourth and last part of the registration clause is the nomination of procurators :—" *And to that effect I constitute*

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CHAPTER III.

my procurators, &c."

The office of procurator here is not, as is sometimes erroneously supposed and stated, to register the deed. That is done at the suit of the holder or creditor, and the procurator for the granter or debtor appears *fictions juris* to consent that decree be pronounced and issued against his constituent.

6. *The Testing Clause.*—The last part of the deed is the Testing Clause ; the essentials of which we have already minutely examined. We have found that it must contain the name and designation of the writer—the number of pages, where there is more than one sheet—the names and designations of the witnesses—the granter's adoption of marginal notes and of words superinduced upon erasures. The date and place of subscription are not indispensable, but it is always advisable to insert them. It is usually stated, that the deed is written upon stamped paper. This is not necessary, but is advisable, in order that the fact may appear by the terms of the extract after the deed is recorded.

TESTING
CLAUSE.

After the full investigation already made of all the particulars mentioned in this clause, we shall only advert here to that portion of it which refers to corrections and additions. There can be no doubt, that such a notice of erasures, deletions, interlineations and marginal notes, in the testing clause, as shows that they were made before subscription, amounts to adoption of them by the maker of the deed. This is either directly stated or implied in the observations in the Court of Appeal upon the important cases recently decided there. In the case of *Kedder v. Reid*, LORD BROUGHAM says :—" It is not necessary that any exact form of words should be used in making reference to erasures, and it may be admitted, that, if there is in the testing clause a statement which amounts to the same thing as asserting the existence of the erasures, it is sufficient ;" and then he goes on to show that this assertion must be specific ; and, while his Lordship animadverts upon admitting a notice of erasures in the testing clause, without more as proof that the erasures existed before the execution, and were known to the maker of the instrument, as objectionable and exposing the right of parties to hazard, he expressly states that this course has been " established in practice and recognised by the decisions." But, while the rule is thus fixed, it is very necessary to attend to the caution contained in the same speech, which prescribes it to be the duty of the Courts carefully to prevent the

NOTICE IN TESTING
CLAUSE OF
CORRECTIONS,
ADDITIONS, &c.

1 Rob. App.
209.

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CHAPTER III.
NOTICE IN TESTING
CLAUSE OF
CORRECTIONS,
&c., *contd.*

practice "from being extended, and to keep the rules respecting it, already all too loose, from being in any particular relaxed." We are to observe then, as stated by LORD BROUGHAM, that the notice of erasures "must be an assertion of all the erasures—that is, all the material ones, having been made and written before execution;" and he afterwards says, that it would not be enough to say, that "in all the instances in which B's name is mentioned in the deed and struck out, and A's name written over it, this alteration was made before execution;" "because there must be a specification of the very erasures in number and position, or such a reference as amounts to a specification." And at page 208 of the report, we have this important practical rule:—"Where it is necessary *after execution* to take notice in the testing clause of an erasure or alteration, such testing clause should not be filled up, unless accompanied with some act by the maker of the instrument, evidencing that he was cognizant of the notice in the testing clause;" and he adds:—"The whole force and effect of an erasure being mentioned in the testing clause is derived from the supposition, that the clause speaks truth, when it asserts the making of these erasures before the execution, and any suspicious circumstances on the face of the clause would destroy the credit thus given to it;" and it is noticed as a circumstance of suspicion in the case, that the last words of the clause, "writer hercof," were written over part of the testator's signature, indicating that in this instance the clause was written after execution.

Although, therefore, a deed *ex facie* regular and correct will be treated as enjoying the legal presumption, that the testing clause which forms part of the body of the deed was completed before execution—a presumption not removed by the fact that insertion after execution is the prevalent practice—we have here an instructive caution, that the completion should be made with the greatest care and accuracy, in order to avoid the least ground of suspicion; and it ought to be an invariable rule in practice to insert the requisite notice of erasures and superinductions, deletions, interlineations, and marginal additions, before subscription.

It only remains here to notice, that, although the proper function of the testing clause is, as its name indicates, to set forth the particulars of the subscription and attestation, it does not follow that its effects are limited to that purpose, and that nothing will be valid, if inserted in the testing clause, unless it relates to the execution. An attempt thus to limit the effect of the testing clause was made in *Johnstone v. Coldstream*, 30th June 1843. This was the case of a settlement by a husband, framed entirely in his name alone, but subscribed also by his wife, the object of whose signature was stated in the testing clause merely, which bore, that "these presents, written by Alexander Stewart Gilchrist, &c., are subscribed by me, and by

TESTING
CLAUSE NOT
LIMITED TO
MERE DETAILS
OF EXECUTION.

5. D. 1297.

"the said Margaret Coldstream, my spouse, in token of her consent to and approval of this deed and all the clauses therein contained, at Dundee, the 10th day of October," &c. The next of kin of the wife objected, that this was not an effectual deed as regarded her consent, because the testing clause did not form part of the deed of a subscriber, which, it was contended, was evident from the decisions holding it competent to fill it up *ex post facto* and even after the grantor's death, and also from its not being necessary to name and design the writer of the testing clause, though a different person from the writer of the deed; it was, therefore, argued, that there was here no ground for holding that the words of consent were inserted before the wife's subscription, or even before her death. This view was supported by Lord IVORY, Ordinary, but the Second Division of the Court unanimously altered his judgment. The Lord Justice Clerk HORR's opinion contains much instructive matter on this point, bearing that the testing clause is as much a part of the body of the writ as any other clause, and that everything which precedes the subscription is a part of the deed, and as much authenticated by the subscription as any other part, if the subscription itself is tested in the form prescribed by law—that the principle of the law of Scotland is, that the deed is completed when subscribed, and the testing clause filled up before subscription—and that it is under the strength of this presumption, that filling up afterwards has been sanctioned. Under this decision the wife's next of kin, her legal representatives *in mobilibus*, were cut off from the succession to her share of the goods in communion by a consent embodied in the testing clause; and we have here, therefore, a strong motive for care and punctuality and circumspection, since results so important may flow from what is so largely confided to the Conveyancer's charge. Another example of matter in the highest degree essential, (*viz.*, the age of a consentor to a disentail, required by statute,) being held to be competently inserted in the testing clause, is presented in *Kelso*, 8th March 1850.

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CHAPTER IV.

DELIVERY OF DEEDS.

THE execution of a deed, however regular and unexceptionable, ~~does~~ not necessarily give it immediate effect. In unilateral deeds, which ~~are~~ evidently executed for the benefit not of the granter but of another, the ~~act~~ is not fully completed until the grantee is put in possession of the deed, ~~as~~ that forms his title to the right which it confers. Delivery, therefore, is necessary to the complete effect of such deeds. The importance of this ~~step~~ is strikingly illustrated by the doctrine of the Law of England as delivered by Blackstone, that, where a deed is sealed by another than the granter, the granter by delivery of it adopts the sealing, and by parity of reasoning he will by the same act adopt the subscription as his own, though written by another. This is a doctrine which, however questionable upon general grounds, is attended with less difficulty in regard to English deeds, inasmuch as, by the express terms of the attest, the witnesses to an English deed are witnesses not only to the signature and sealing, but also to the delivery, while in Scotland, as we have seen, all that the witnesses attest is the verity of the subscription.

DEEDS NOT OB-
LIGATORY UNTIL
DELIVERED.

The general rule of our law then is, that a deed is not obligatory, although completely executed, until it shall also be delivered. While it remains with the granter, or with his agent, or with any other party acting on his behalf, it is not obligatory, the presumption of law being that his resolution had not been finally taken. A deed, therefore, found after the granter's death in the hands of his agent, was held not to be delivered; *Irvine v. Irvine*, November 1738.

M. 11,576.

WHAT CONSTI-
TUTES DELIV-
ERY OF A DEED.

With regard to the general doctrine there is no doubt or ambiguity; but great difficulties have been felt in determining under doubtful circumstances, whether the act of delivery has taken place; and the decisions in such cases have not been entirely uniform. In the case of *Stamfield's Creditors v. Scots*, 26th December 1696, the granter of an assignation informed the grantee verbally, that the deed was subscribed, directed to him, and lying on his table, and that on Monday it should be delivered. The granter was murdered that night, but

4 Br. Supp.
844.

the assignation was found lying on his table, subscribed, and directed to the grantee. This was maintained to be equivalent to delivery, on the ground that it is not so much the *traditio de manu in manum* that makes the delivery, as a rational act of the will, declaring the purpose and resolution. The Lords, however, thought this "a too nice and metaphysical tradition," and found the deed an undelivered evident. In the case of *Crawfords v. Kerr*, 18th November 1807, a party wrote to his creditor enclosing bank-notes and a bill in payment of his debt. The letter was wafered and intrusted to a servant, to be given next morning to the post-runner. The party died in the morning before the postman came, and the letter was opened and the money retained. In a competition between the party to whom the letter was addressed, and the general creditors of the deceased, the letter with its contents was held to have been effectually delivered. On comparing these cases, there are not grounds for any distinction between them, with the exception that in the case of *Stamfield* the granter had verbally expressed an intention to send the enclosed deed, which might have been held suspensive of the act of delivery. The case of *Crawfords* appears to involve in its decision the true principle, viz., that the delivery is complete when the granter has himself done whatever he can to complete it. No formal or written act of delivery is requisite; and when a deed is found in the hands of the grantee, it is presumed to have been delivered, unless the contrary shall be proved by his writ or oath. Onerous deeds, appearing in the hands of the grantee, are presumed to have been delivered at their dates; and this is an important point in questions with an heir; *Gordon v. Maitland*, 1st December 1757. M. 11,165.

Difficulties occur also, where the deed is left in the hands of a third party. If it is so deposited with express instructions, effect of course will be given to the deposition in conformity with the design so declared. We have seen, however, in the case of *Logan v. 2 S. 253*. *Logan*, 27th February 1823, where an instruction to destroy deeds was unavailing because improbate, that such instructions must be given in legal form. In the absence of any specification of the purpose for which deeds are committed to the custody of a third party, the question, whether they have been delivered or not, will be determined, in the first place, by facts and circumstances indicative of the granter's intention in making the deposit. This rule was laid down in the case of *Maiklem v. M'Gruthar*, 29th March 1842; and it had previously been acted upon in the case of *Ramsay v. Maule*, 15th January 1828, where a bond of annuity, deposited in the hands of a party who was agent both for granter and grantee, was held to be delivered, having been acted upon and payments received by the grantee through the medium of the holder. This decision was affirmed upon appeal. The same rule again received effect in

M. v. "Move-
ables," App.
No. 2.

DELIVERY OF
DEEDS, contd.

4 Wil. and Sh.
App. 58.

- PART I.** the remarkable case of *Mair and Sons v. Thom's Trustees*, 20th February 1850. In that case, a bond for £900 had been left in the hands of a party, agent for both creditor and debtor. Of the sum in the bond a part only had been advanced, when the custodier died. The bond was thereupon delivered by his executor to the lenders; but the Court held that it had been improperly given up, having been a delivered deed only *quoad* the amount advanced, but undelivered with respect to the part unpaid. In the absence of all evidence with respect to the purpose of deposition, it is the opinion of Lord STAIR, that writs in the hands of third parties are presumed to be delivered. Here, however, Mr. Erskine distinguishes between onerous and gratuitous deeds, holding that a gratuitous writing in the custody of a stranger will be presumed to have been deposited with him under a tacit condition of being returned to the granter, if called for during his life, and if not, that it shall be delivered to the grantee upon his death; *Ker v. Ker*, 25th January 1677; where a gratuitous disposition, delivered to a stranger without expressing the purpose of delivery, was held revocable. The decision in *Holwell v. Cuming*, 31st May 1796, was to the like effect. But Erskine confirms the general presumption in favour of the grantee, where deeds are in the hands of a third party, who is agent for both granter and grantee; and this doctrine was expressly recognised and acted upon in the case of *Ramsay* just cited, and may, therefore, be held as authoritative, with the qualification, (noticed in the case of *Maiklem*,) that this presumption does not exclude a regard to the party's real intention as indicated by facts and circumstances. It is decided, that the judicial ratification of a deed by a wife does not import delivery; *Bathgate v. Cochrane*, January 1685; and, therefore, her deed, although ratified, is not obligatory until actually delivered.
- CHAPTER IV.** But we must always have regard to the essence of the transaction as imposing upon parties their true position, although that may be different from the position assigned to them by the external form which it assumes. Thus, a bond taken by A in favour of trustees for his child and grandchildren, although granted by another party, is the deed of A, and his intention that it should be irrevocable being proved, the deed is effectually delivered by deposition with one of the trustees; *Collie v. Pirie's trustees*, 22d January 1851. Another example of regard being had to the essence of the matter, independently of the formal position of parties, is presented in a striking form in *Balvaird v. Latimer*, 5th December 1816. James Balvaird, with his own money, purchased a property, and took the disposition in favour of George Balvaird, his nephew. The deed originally bore payment of the price by the nephew, but the uncle, before his death, substituted his own name in the narrative as having paid the price. Until his death, the uncle treated the property as his own, levying the
- 12 D. 748.
- iv. 42, 8.
- M. 8249.
- M. 11.583.
- 6 S. 343.
- 4 D. 1182.
- M. 17,004.
- DELIVERY OF DEEDS, *contd.*
- 18 D. 506.
- F. C.

rents, &c. By a general disposition James Balvaird left his whole property, heritable and moveable, to his widow, and the Court found her entitled to the house in question, holding, that, as the disposition was never delivered to the nephew, the property remained with the uncle and subject to his disposal. Registration or infestment would have been equivalent to delivery, but so long as the deed remained latent with the uncle, it and the property were at his disposal.

There are various exceptions to the rule requiring the delivery of deeds in order to make them effectual. Thus, delivery is unnecessary where, by the terms of the deed, the granter has dispensed with delivery. This is a clause introduced into deeds executed *intuitu mortis*, and the purpose of it is to shew, that the deed is not intended to take effect until after the granter's death, as in such deeds, which by their nature are necessarily revocable, the power of revocation ceases at death, they acquire upon that event the force of delivered deeds, and the Courts will then ordain them to be delivered to the grantee, as in the case of *Eleis v. Inglis*, 23d July 1669; or to be put upon record, which was done in the case of *Logan v. Logan*, 27th Feb. 1823, already referred to. Bonds of provision in the custody of a father, whether granted by himself, or taken by him from another party, in favour of his children, do not require delivery, the father being the proper custodier; *Adair v. Adair*, 20th January 1725; *Hamilton v. Hamilton*, 9th January 1741. In the latter case, the bonds were taken by the father from his son in favour of his other children. So also, in *Riddel v. Inglis*, 3d January 1750, a bond by a father in favour of his children, delivered to his wife who also had an interest under the deed, was held to have been delivered, so as to validate a claim at a child's instance. The authority of this decision, however, is questioned by Kilkerran. The purpose of the father to benefit the child must not be matter of doubt. In *Keddie v. Christie*, 24th November 1848, a father had deposited money in his son's name, and the deposit receipt was found undelivered in the father's repositories. The Court disposed of the case on the principle of doing substantial justice *inter rusticos*, and held that the document gave the son no preference for the amount deposited. A post-nuptial settlement by a husband upon his wife does not require delivery, the husband being the legal custodier for the wife during the marriage; *Lindores v. Stewart*, 18th February 1715; *Porterfield v. Stewart*, 15th May 1821. These cases may be taken as establishing the rule in opposition to the earlier decision in *Hindrick v. Dickson*, 5th December 1627, where a contrary judgment was pronounced. Nor is delivery requisite where the granter has himself an interest under the deed, which is, therefore, presumed to be held by himself on behalf of the whole grantees; *Hadden and Lawder v. Shorswood*, 19th June 1668. This was an assignation of a bond reserving the

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WHEN ACTUAL
DELIVERY OF
DEEDS NOT RE-
QUIRED.

1. CLAUSE
DISPENSING
WITH DE-
LIVERY.

M. 16,999.
2 S. 253.

2. BONDS OF
PROVISION BY
FATHER TO
CHILD.

M. 17,006.
M. 11,576.

M. 11,577.

11 D. 145.

3. POSTNUPTIAL
SETTLEMENTS.

1 S. 9.

1 Br. Supp. 238.

4. DEEDS IN
WHICH GRANTEE
HAS AN IN-
TEREST.

M. 16,997.

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M. 17,002.

DEEDS EFFECTUAL WITHOUT DELIVERY.

7 S. 868.

M. 12,304.

M. 17,007.

M. 653.

p. 638.

5. S. 735.

2 Hailes, 912.

EQUIVALENTS TO DELIVERY.

M. 6548.

6 D. 180.

M. 11,185.

M. 16,757.

ACCEPTANCE OF DEED BY GRANTEE.

granter's liferent. In *Stark v. Kincaid*, 11th December 1679, a disposition of lands was sustained though found in the disponent's repositories, in respect it contained a reservation of his liferent. In both these cases the deeds also contained a power of revocation.

Deeds which the granter was under an antecedent obligation to execute are effectual without delivery, as in the case of *Cormack v. Anderson*, 8th July 1829, where the undelivered deed was a bond for borrowed money. Bipartite contracts are effectual without delivery. This was decided in the case of minutes of sale of lands; *Crawford v. Vallance's heirs*, 29th June 1625. The same rule was formerly extended to a decree arbitral; *Simpson v. Strachan*, 10th December 1736. But an opposite decision was pronounced in *Robertson v. Ramsay*, 20th June 1783, in which an award, executed but not delivered, was held to be ineffectual; and in a note to Erskine's Institutes, it is attempted to reconcile these judgments, so as to maintain the former doctrine that a decree arbitral does not require delivery. But the contrary may now be regarded as settled by the judgment in *Macnair v. Gray*, 31st May 1827, where it was held that two interim decrees arbitral, which had been executed, and copies communicated to the parties, were notwithstanding inoperative, the arbiters having declined to deliver the principal decrees before the submission terminated. In pronouncing this judgment, the Court proceeded upon the authority of the case of *Robertson*, and of LORD BRAXFIELD's opinion in that case, that "an arbiter does nothing effectual, until "he either delivers or registers his decree."

If the granter of a deed retained in his own possession shall act upon it as if it were delivered, that will be held equivalent to delivery; *Dick v. Oliphant*, 24th January 1677. Here the granter had raised horning in the assignee's name upon an assignation executed by himself. The placing of a deed upon a public record is also equivalent to delivery; *Downie v. Mackillop*, 5th December 1843; and the same effect will follow the registration of a sasine upon an undelivered bond; *Bruce v. Bruce*, 2d June 1675. The agent in the cause may be examined as a witness *cum nota*, to prove the delivery of a deed to which he was an instrumentary witness; *Earl of March v. Sawyer*, 21st November 1749; and this is a case in which the agent in the cause will still be a competent witness, as contemplated by 15 & 16 Victoria, cap. 27.

In order to the complete effect of a deed, it is of course necessary that the grantee accept of it. It will not subject a party to the liabilities inferred by the acceptance of a deed, if he have merely received it, as that may be in order to deliberate whether he will accept. But his acceptance will be sufficiently proved, not only by his declaration to that effect, written or verbal, but by his taking

the deed and acting upon it, taking the benefit of its provisions in his favour, placing it upon record, or otherwise treating it as an accepted deed.

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It remains only to notice, that, where a deed is by its own tenor revocable, although not expressly declared revocable, as a conveyance granted *mortis causa* and containing a reservation of liferent and dispensation with delivery, it is not rendered irrevocable by delivery; and, accordingly, where a deed of the nature referred to had been executed and delivered to the disponent, the granter was, notwithstanding, held entitled to revoke it; *Miller v. Dickson*, 11th July 4 S. 822. 1826. But the mere statement, that a deed is made in contemplation of death, does not imply a power of revocation, if its tenor and provisions combine with the fact of delivery to shew that it was designed to be acted upon immediately. In *Miller v. Miller*, 13th November Hume, 234. 1798, a father had conveyed his lands and whole other property to his son by a delivered deed containing no power of revocation, and it was held to be irrevocable.

Mortis causa
DEEDS NOT IR-
REVOCABLE,
THOUGH DELIV-
ERED.

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CHAPTER V.

THE DOCTRINES OF HOMOLOGATION AND *REI INTERVENTUS*.

HOMOLOGATION. 1. *Homologation*.—ALTHOUGH writings, which are defective in the statutory solemnities or upon other grounds, do not carry on their face the authoritative character which is given to those enjoying the privileges of probative deeds, and although such defective writings cannot, therefore, receive effect as evidence in themselves against the granter, yet the act, intended to be done through the medium of the deed, does not from such defects of necessity fail in its object. No doubt, while the defective deed stands alone, effect cannot be given to it, but, if the granter shall by any posterior act give evidence of that consent, which the deed has failed authentically to convey, by such posterior act he will be held to supply his consent, and he will thus incur the same obligation as if the deed had not been liable to objection. This is the doctrine of **HOMOLOGATION**, and it is founded upon the principle, that, as the defective writing fails of effect upon grounds which the law admits for the protection of the granter, so it is in his power to relinquish these grounds, and to waive the objections he might take to the deed, and to acknowledge that it is obligatory upon him. This acknowledgment is effectually made by acts, which unequivocally treat the objectionable deed as valid.

A familiar example of the effect of homologation occurs in the case of submissions, which by an established rule of law may be validated *rebus ipsis et factis*, notwithstanding defects in the deed of submission.

M. 5659. Thus, in *Brown and Colville v. Gardner*, 10th January 1739, a decree arbitral following upon a submission was sustained, although one of the submitting parties had not subscribed the writing constituting the submission, upon the ground that he had, notwithstanding, appeared before the arbiter and adduced evidence; and in *Telfer v. Hamilton*, 21st January 1735, a deed of submission by a married woman, null upon account of there being only one witness to her subscription, was found to be homologated by her husband appearing and pleading before the arbiter. Another illustration of the principle is the approbation of a deed after majority by a minor, such approbation being gathered either from his direct consent, or from acts implying consent.

M. 5657.

Thus, in the case of *Linton v. Dundas*, January 1729, a party, having after majority taken advantage of arrangements connected with a sale of his lands during minority, was found to have thus homologated the sale, and to be debarred from insisting in the objection he might otherwise have taken. PART I.
CHAPTER V.
M. 5624.

It is to be kept in view, that the doctrine of homologation applies only to such deeds as were originally capable of being made, and that posterior acts can have no effect in validating deeds granted by parties labouring under an absolute incapacity. A deed by an idiot, therefore, cannot be made effectual by homologation, as such a party cannot be held capable of consent affecting his own interests in any degree; *Morton v. Young*, 11th February 1813.* In *Stein's Assignees v. F. C. Gibson-Craig*, 2d June 1829, the assignees in an English bankruptcy adopted a Scottish trust deed, and afterwards challenged it. The Court of Session, proceeding upon the opinion of English counsel that it was competent for the assignees to homologate the deed in question, found that it had been effectually homologated. But the House of Lords, holding the opinion of English counsel to be wrong, reversed the decision, on the ground that the assignees could not homologate a deed, which it was incompetent for them to have originally granted. The objection of incapacity, however, in cases of homologation, does not extend to deeds granted by minors without consent of their curators, or by married women without their husbands' consent; because, although these parties lie under a legal disqualification effectually to bind themselves without consent of their guardians, yet they are capable of an intelligent consent. It is a rule also, that, where the nullity arises from the defective observance of the solemnities, deeds may be homologated, it being competent to the granter to renounce the benefit of objections introduced for his own protection. WHAT DEEDS
ARE CAPABLE
OF BEING HOMO-
LOGATED.

5 Wil. and Sh.
App. 47.

It is a postulate of the doctrine of homologation, that the approbatory act must be done by a party capable of consent, and a deed REQUISITES OF
THE ACT OF
HOMOLOGATION.

* In a reduction of certain deeds, the defender proposed to meet the pursuer's issue of insanity with a counter-issue of homologation. It was held that he was not entitled to such counter-issue. "As to the issue that the deeds are not the deeds of the pursuer, I am of opinion, that if the defender proposes to have them declared to be the pursuer's deeds by adoption or homologation after he became sane, he must do so in an action of declarator. The deeds are *ex hypothesi* null, and can only become binding by establishing in a proper action the deliberate adoption of them by the pursuer, when he was in his sound mind."—Per LORD JUSTICE CLERK; *Gall v. Bird*, 3d July 1855. The same case also shews, that it is competent to meet an issue of facility and lesion by a counter-issue of homologation. 17 D. 1027.

"When the original party homologates, he either ratifies a deed or obligation already executed, but imperfectly; or he adopts and gives effect to what would otherwise be null. When there is already an obligation existing, though imperfect or subject to exception, homologation may have the effect of confirming it as good from the first: Where the deed or obligation is null, homologation acts only as the adoption of what is reduced to an intelligible and precise shape, but is in no degree binding; and the binding effect has in this case no retrospect."—1 *Bell's Comm.* 145.

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CHAPTER V.

1 S. 154.

therefore, cannot be homologated either by an idiot, as already observed, or by a woman clothed with a husband; *Roses v. Rose*, 20th November 1821. Here a bond, granted by a female under age, and ratified by her marriage contract, (which was also executed by her under age,) was found not to be thereby homologated. In order that homologation may be effectual, it is essential that the party know the contents of the deed, which he thereby adopts; and instrumentary witnesses, therefore, are not bound by the deeds which they subscribe in that character, since they are called merely to attest the subscription, and do not necessarily know anything of the contents of the deed. Where the circumstances are such, however, as necessarily imply knowledge on the part of an instrumentary witness, he has been held to be committed to the contents of the deed, as in *Davidson v. Davidson and Weir*, 13th July 1714, where an eldest son, having signed as witness to his sister's marriage contract, was held to be thereby debarred from challenging a bond by their father in her favour, which was assigned by the contract.

M. 5652.

REQUISITES OF
THE ACT OF
HOMOLOGATION,
contd.

1 S. 158; *affd.*
1 Sh. App. 169.
M. 5677.

The act inferring homologation must be clear and unequivocal; and, therefore, mere non-interference by a party, at a period when no personal interest to himself has yet emerged, will not infer homologation; *Duke of Gordon v. Innes*, 16th November 1821; and, in *Dallas v. Paul*, 13th January 1704, it was decided that the signature of an apparent heir as instrumentary witness to his father's settlement, did not import the heir's consent to it, and that, whether he knew the contents or not. This decision was pronounced after careful deliberation, and the report bears that the Lords resolved to follow it as a fixed rule in time coming. Nor do acts performed necessarily or under compulsion imply homologation; and so, when a superior under a charge grants an entry, his doing so is no homologation of the vassal's right.

HOMOLOGATION
OF MARRIAGE
CONTRACTS.
M. 9174.

It has been held in the case of a marriage contract imperfectly executed, that the subsequent marriage validates it by homologation; *Wemysses v. Wemyss*, 16th November 1768. The contract was not subscribed by the wife, but; in respect of the subsequent marriage, it was found subsisting and obligatory upon all parties. The practical effect is shewn by the subsequent case between the same parties, *Tod v. Wemysses*, 12th December 1770, the widow being excluded from her legal share of certain property, because it had been disposed of by the marriage contract. The decision in *Kibbles v. Stevenson*, 18th December 1830, was to the same effect, a marriage contract, defective in the testing clause, being held validated by the marriage; and this decision was affirmed on appeal, 23d December 1831. In such cases, however, there must evidently be grounds for holding that the imperfect deed expresses the mind of both parties, and it was, therefore, found, that mere proposals of marriage, given to the wife's

M. 6451.

9 S. 233.

5 Wil. and Sh.
App. 553.

brother, but not shown to her or her father, cannot receive the effect of a marriage contract; *Campbells v. M'Glashan*, 5th June 1812.

PART I.
CHAPTER V.

It has been observed, that the effect of homologation is to deprive the party of objections otherwise competent to him; but it is most important to remark, that this effect results only in so far as regards the homologating party himself, and that the effect of such acts does not extend to third parties who are not bound to acknowledge them; and in so far, therefore, as they may have an interest, the deed continues as open to objection as ever.

It is competent for a party, where a deed not only confers a right upon him, but subjects him to burdens, to homologate it, only in so far as it is favourable; but, in order that this effect may result, protestation must be made, clearly defining the extent of the approbatory act; and, if this is neglected, acts of homologation will be construed as referable to the whole matter. In *Carmichael v. Macritchie* (*Carmichael's trustee*), 8th February 1823, a party having accepted of a small legacy under his father's settlement, of which he also acted as a trustee, without protesting for reservation of his legal rights, was found to be debarred from claiming legitim.

HOMOLOGATION
UNDER PROTESTATION.

2 S. 198.

Homologation will not be implied, where a deed is used to realize a right which equally belongs to the user under a different title; and thus the receipt of rents, under a lease granted contrary to the terms of an entail, was not held to bar the succeeding heir from afterwards reducing the lease; *Malcolm v. Bardner*, 19th June 1823.

2 S. 410.

2. *Rei interventus*.—Closely connected with the doctrine of homologation is that of *rei interventus*. This arises, *ubi res non sunt integræ*; and the import of the rule is this, viz., that, where, upon the faith of a contract fully agreed upon, but not made formally binding, anything is done by either party, which cannot be recalled so as to restore both parties to a position identically the same as they had previously occupied, then the contract is held to be completed by being so acted upon. In the perfecting of contracts by deed, *rei interventus* is available only to supply want of form or of authentication; and it is not, therefore, available where the subscription of the party is not admitted; *Graham v. Macleod*, 30th November 1848. The examples

11 D. 173.

of the perfecting of contracts by *rei interventus* are very numerous, and we shall select only a few by way of illustration. Leases, imperfectly constituted by writing, are nevertheless effectual, if possession follow; *Grant v. Richardson's Representatives*, 10th July 1788. This was the case of a letter from the landlord promising to grant a lease, not holograph, but followed by possession. There are various cases, in which the writing constituting a lease has been signed only by one of the parties, but validated by *rei interventus*; see the case of

Rei Interventus
IN THE CASE
OF LEASES.
M. 15180.

- PART I. *Countess-dowager of Moray v. Stewart, &c.*, 23d July 1772. Here the lease had not been signed by the landlord; but the House of Lords, reversing the judgment of the Court of Session, declared it as effectual and binding as if it had been signed by him; and in *Macpherson v. Macpherson & Clark*, 12th May 1815, tenants, who had entered into possession upon a missive granted by the landlord but not subscribed by them, were found to be effectually bound by it. In *M'Arthur v. Simpson*, 6th July 1804, a letter subscribed by initials, and followed by possession, was held to constitute a valid lease. In the case of *Sutherland & Co. v. Hay*, 12th December 1845, the doctrine will be found stated and illustrated, that acts importing *rei interventus* need not necessarily be done by the party seeking to resile; and so acts done by the landlord on the faith of an improbate lease bind the tenant, although no possession may have followed. Upon the same principles, an informal missive was held to be validated by improvements executed by the tenant under the proprietor's eye in contemplation of the lease, although previous to its commencement; *Murdoch v. Moir*, 18th June 1812. And even a verbal tack for nineteen years is validated by payment of a grassum, and *rei interventus*; *Macrorie v. Macwhirter*, 18th December 1810.
- Rei Interventus, contd.* The general rule that writing is essential to a sale of land suffers an exception in the case of a verbal agreement to sell, followed by payment of part of the price; *Lawrie v. Craick & Maxwell*, 23d December 1697. In the case of *The Dunmore Coal Co. v. Youngs*, 1st February 1811, an improbate obligation, granted by a party to procure his son's liberty, was held to be validated by the liberation of his son from a messenger's hands. In *Gibb v. Ogg*, 5th March 1835, an informal obligation for payment of an annuity was held to be validated *rei interventu*, a process having been abandoned upon the faith of it, and one year's annuity paid; and in the cases of *Ballantyne v. Carter*, 21st January 1842, and *Johnston v. Grant*, 28th February 1844, improbate letters, not entitled to the privileges of writings *in re mercatoria*, were held to be validated by the advance of money on the faith of them. In *Nicholson v. M'Alister*, 11th June 1829, the verbal promise of a father to pay a tocher of £1000 with his daughter, having been followed by her marriage, was held relevant and admitted to proof. Lastly, in the case of *Hamilton v. Wright*, 22d January 1836, affirmed on appeal, 12th February 1838, a co-obligant in a bond of annuity, improbate by the misnaming of a witness, was held to be debarred from pleading that defect, by the circumstance that the price of the annuity had been paid into his hands, it being considered immaterial, whether the money was received for his own use, or for that of another. In a subsequent stage of the same case, *Hamilton v. Wright*, 22d November 1839, the party having pleaded,
- PART I.
CHAPTER V.
M. 4392.
F. C.
M. 15181.
8 D. 283.
F. C.
F. C.
Rei Interventus, contd.
M. 8425.
F. C.
13 S. 612.
4 D. 419.
6 D. 875.
7 S. 743.
14 S. 323.
3 S. and M'L. App. 127.
2 D. 86.

that at all events the bond, being open to this objection, could not form the ground of summary diligence, the Court disallowed that plea also, and held, that, by the decree of absolvitor in the previous action, the deed had been in all respects reintegrated in a question with this co-obligant. The judgment of reversal, pronounced by the House of Lords, 2d August 1842, does not appear to affect this part of the interlocutor in the Court of Session.

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¹ Bell's App.
⁵⁷⁴.

PART II.

THE WRITINGS EMPLOYED IN THE CONSTITUTION, TRANSMISSION, AND
EXTINCTION OF PERSONAL OR MOVEABLE RIGHTS.

INTRODUCTION.

PART II.
—
INTRODUCTION.

HAVING inquired into the essentials, which are common to all deeds, as regards the capacity of the parties, the subject-matter, and legal consent, and having shewn the nature of the solemnities requisite in deeds, and adverted to their general structure, besides explaining the object of registration, and the legal rules according to which defective deeds may, in certain circumstances, be raised into effect, we have completed the first portion of our investigations, the purpose of which was to shew the qualities and requisites which all deeds possess in common. We are now, therefore, to proceed with a more particular inquiry into the structure and effect of the instruments employed in constituting, transmitting, and extinguishing rights connected with the two great classes of things into which property is divided.

RELATIVE
IMPORTANCE OF
HERITABLE AND
MOVEABLE
RIGHTS IN
EARLY TIMES.

Although it is the prevailing opinion, as we have already found, that in primæval times things moveable—that is, not fixed to the soil, were the first objects of property, yet it is evident, that, as society was formed and became consolidated, an increasing importance must have attached to the soil and the rights connected with it, as yielding the means of permanent subsistence. The value of land necessarily advances with civilisation, and in the early history of tribes and nations the possession of it forms a chief subject of contention. This was especially the case amongst the occupants of the north of Europe. The Helvetii, as we read in the beginning of Cæsar's Commentary upon the Gallic war, found their territory too limited for a people so numerous and so renowned in arms, and after two years' careful preparation sallied forth to win a wider dominion by force of arms, burning their property, and particularly everything moveable which could not be of service in the enterprise.

The feudal system was built upon this spirit. Territorial property—

the rights and privileges connected with the soil—absorbed the interest and attention of men, and even after possession became comparatively secure, the habits induced by feudal practices, and the feelings created by the system and fostered for its preservation—all tended to magnify into exclusive importance the rights connected with the feudal estate of land, while possessions of a moveable description were lightly valued, and of no repute in the estimation of the law. Commerce did not then exist to counteract this view, which was confirmed by the permanency of land-rights, all other property being accounted transient, and, therefore, valueless. The system was aided also by the simplicity of manners, and the absence of luxury and refinement. Amid such circumstances, there was little demand or occasion for moveable property, and it did not, therefore, exist in great quantity, and the inferior importance attached to it prevented its receiving that jealous protection, with which all rights of a feudal nature were guarded. To these views are ascribed the large imposts upon moveables, amounting in some cases to 10 and even 15 *per cent.*, exacted in early periods of our history, and the punishment of offences comparatively trivial by the apparently oppressive forfeiture of all the party's personal effects. From the same cause, as we read in Blackstone, the ancient English law-books contain little or nothing regarding the moveable species of property, some of them being entirely silent upon that subject, and whatever occurs in others being chiefly borrowed from the Civilians. The same remark has been made upon our old Scotch institutional writers, even Craig bestowing no attention upon moveable rights, except in so far as they are connected with the feudal relation.

Such a state of things was evidently suitable only to a condition of society, in which all or nearly all persons were immediately dependent upon the land and its fruits. But the introduction of commerce was destined greatly to change the face of society, and the relative value attached to the different species of property. In its advance, commerce grew upon the wants which itself created. Enterprise increased. Many, and daily more, released themselves from the chains, which had previously made all in some sense slaves of the soil, in order to follow out this new path to adventure and wealth, while others, tasting of the luxuries which commerce bestows, came gradually to attach greater importance to that portion of their property, which ministered to or furnished the means of purchasing new sources of enjoyment. As commerce, therefore, increased, that kind of property with which it is concerned (*moveable*, because it can be transported from place to place,) increased also, and gradually attracted more of the attention of the Legislature, and the rights connected with it came to be regarded with as much favour as those connected with land, and to be regulated with no less care.

PART II.

INTRODUCTION.

RELATIVE
VALUE AND
IMPORTANCE OF
HERITABLE AND
MOVEABLE
RIGHTS.

PART II.

INTRODUCTION.

RELATIVE
VALUE AND
IMPORTANCE OF
HERITABLE AND
MOVEABLE
RIGHTS, *contd.*

The Roman Law was a stranger to the broad distinction, now referred to, between territorial and moveable rights. The diversity of its genius from that of the feudal Law is to be found in this, that, while the latter is based upon the soil, and regards persons as in a manner subordinate, determining their rights by rules which have all a reference more or less direct to the feudal estate, in the Roman Law the point of departure, as well as the chief object, is the PERSON. The personal right, and not the nature of the subject, was the principal matter in its estimation, and there were no degrees of importance or dignity in things, at all corresponding to the marked distinction drawn by the feudal system between the rights of land and those of a moveable character. And as the Roman jurisprudence, which was moulded under a succession of governments widely different in their constitution, contained in multiplied variety rules, founded upon the principles of natural justice, for the regulation of the rights connected with every species of property, there is no cause to regret, that, by the order of Providence, this system survived the fall of the empire under which it was consolidated, and the long darkness of the middle ages, and that in this, as well as in other countries of Europe, it has contributed so large an influence in determining the rights connected with personal property, as these have been gradually evolved by the progress of commerce and the advance of civilisation.

DIVISION OF
THINGS BY THE
ROMAN LAW.

The Roman Law divided things into two classes, *Corporeal*, consisting of things material and tangible, and *Incorporeal*, consisting of rights. Corporeal things again were divided into immoveable, as lands and houses, and things moveable.

DIVISION OF
PROPERTY BY
THE LAW OF
SCOTLAND.

The division of things by the law of Scotland is characteristic of the feudal origin of that portion of it which has longest subsisted. By the Roman Law, when a person died intestate, his nearest relations in the same degree succeeded to his whole property, moveable and immoveable, in equal shares—a system which has prevailed in France since the Revolution, and which tends directly to the indefinite subdivision of property. But the genius of the feudal system takes the opposite direction, and aims at the preservation of estates undivided. Accordingly, where it prevails, the feudal estate is given to one relative, who is called the heir-at-law, and is regarded as the representative of the deceased and head of the family, while the other kinsmen of the same degree receive only that part of the deceased's property which is moveable, and which formerly was generally but of trifling value. It is this rule of succession, which has determined the classification of property in Scotland into HERITABLE and MOVEABLE—the heritable comprehending that which descends to the feudal representative or heir-at-law—the moveable, that which is given to the next-of-kin, who are called the executors.

It is not the business of this Chair nicely to distinguish the rules which separate heritable and moveable rights. Heritable subjects comprehend generally the land with all that it contains, as mines, or minerals, and all that becomes permanently fixed to it, as houses. Rights connected with heritable subjects are also heritable, and so also are titles of honour, and rights bearing a tract of future time, like annuities. Moveable rights are those which do not possess the feudal character; and comprehend money, furniture, cattle, corn, mercantile stocks, ships. The rents also of heritable subjects already due are moveable.

PART II.
INTRODUCTION.
DIVISION OF
PROPERTY BY
LAW OF SCOT-
LAND, CONS^d.

We are now to address ourselves to the examination of the writings, employed in securing rights connected with these two great divisions of property. According to the ancient ideas of their relative importance, and according to priority in the order of time, heritable rights should take precedence. But it is convenient, and tends to simplicity and perspicuity, to invert this order, because moveable writs are in their nature the more simple; and a large class of writings connected with heritable rights, viz, heritable securities for money lent, are based upon the personal bond, to which the security is accessory. For these reasons, we shall now consider the writings which relate to MOVEABLE RIGHTS; and, in the *first* place, as the most simple in form of the deeds executed according to the solemnities, the Moveable or Personal Bond.

PART II.

CHAPTER I.

CHAPTER I.

THE INSTRUMENTS BY WHICH MOVEABLE OR PERSONAL RIGHTS
ARE CONSTITUTED.

History of the Personal Bond.—Although the personal bond is one of the most familiar of our instruments, and in its form the most simple, it was only at a period comparatively recent, that it assumed its present shape. Mr. Ross, in his lecture upon the moveable bond, has given an elaborate and most instructive review of its history. There is not space here to traverse the ground, which he has marked out. But it is desirable, that his treatise be carefully perused, since we cannot here do more than touch upon those points, which are chiefly necessary to an intelligent perception of the import of the terms used in the personal bond.

HISTORY OF
USURY.

The origin of this instrument is involved in the history of usury, a subject of remarkable curiosity and interest. The prohibition of the exaction of interest by the Mosaical law can be traced not only to the design of weaning the Jews from the usurious practices of the Egyptians, who were a commercial nation, but also, and more directly, to the grand purpose of making them a separate people detached from all other nations; and this law was peculiarly adapted to accomplish that purpose, since it was not only a rule of love between the Israelites, whom it forbade to take usury one from another, but a rule of repulsion towards the stranger, from whom it permitted interest to be taken. It is not so easy to ascertain the source of the disapprobation and even horror, with which the exaction of interest was regarded by the ancient Romans, unless we attribute it to the same insensible tincture of the Jewish writings which we trace in Horace, when he describes the flood, or in Virgil, when, in his Pollio, he appears to translate the prophecies of Isaiah. But it is easy to perceive, how powerfully these combined influences must have tended to suppress the legal sanction of usury, when the practice was not only alien to the opinions of the nation which has impressed its own jurisprudence so largely upon the legislative systems of Modern Europe, but was regarded also with the strength

of a religious hatred by a zeal too blind to distinguish between the quality of the thing, and the divine purpose in forbidding it to one particular people. From these causes it was long before the exaction of interest received any public countenance. Occasionally the exigencies of commerce prevailed sufficiently to obtain a temporary permission of interest, as under Constantine, who authorized the taking of one *per centum per mensem*, which was called *usura centesima*. But the voice of the Church was unanimous in condemning the practice. It was forbidden by the Canon law, and the prohibition was thence imported into the laws of England and Scotland. But it was in vain thus to dream of resisting the progress of commerce and art. The prohibition of usury was either directly or covertly disregarded, and the Jews—that singular people, dispersed but yet distinct—were at hand to aid in the evasion. Their extortions, and the persecutions which these entailed, furnish a striking page in history. Exacting, but skilful and indefatigable, they amassed enormous wealth, but they paid for it in universal hatred and persecution. In the year 1210, all the Jews of both sexes in England were imprisoned by King John, in order to extort money from them, and he caused a tooth to be extracted every day from a Jew of Bristol, until he should pay 10,000 merks, (equal to £100,000 sterling,) to which the victim submitted on the eighth day, after losing seven of his teeth. In 1279, two hundred and eighty Jews were put to death by Edward I. for clipping and counterfeiting the coin of the realm and importing base money; and, in 1290, the Jews were banished from England, and not permitted to return until the restoration of Charles II.

Various expedients were resorted to in order to evade the laws against usury. Loans upon pledge were tolerated in the time of Henry III., and the students of Oxford, having pledged all their books, were forced to apply to Edward I. for relief. That monarch absolutely abolished usury. The system of loans upon pledge without visible profit was still practised, however, and other colourable devices were used, of which the lending of money at a profit was the true object, although the form of the transaction was intended to conceal that purpose. A common subterfuge was a counterfeit sale, in which the lender sold his goods for, say, £110, payable in a year, and immediately bought them back for £100, paid at the time. These devices were put an end to by the Act 37 Henry VIII. cap. 9, which prohibited such shifts and corrupt bargains, and legalized the exaction of interest; allowing it to be taken to the amount of £10 for the forbearance of £100 for a year. It was again prohibited by Edward VI., but the statute of Henry VIII. was restored in the reign of Elizabeth. These enactments, however, did not put an end to another form which had been introduced for the purpose of eluding

PART II.
CHAPTER I.
HISTORY OF
USURY, *contd.*

DEVICES FOR
EVADING THE
LAWS AGAINST
USURY.

LEGALISING OF
INTEREST IN
ENGLAND.

PART II.

CHAPTER I.

DEVICES FOR
EVADING THE
USURY LAWS,
cont^d.

PENAL BOND.

the prohibition of usury. The Civil Law allowed damages, to the amount of double the value, in certain contracts. Upon this precedent, was introduced the English penal bond, whereby the granter obliges himself to pay double the amount of the sum really owing. The purpose of this was, that the creditor might have an equivalent for his interest in the event of the debtor failing to pay it. This penalty was treated as the real debt by the Courts of Law, for the Judges could not give judgment for the interest, but they subjected the debtor in the full penal amount ; and this construction continued for some time after the 37th of Henry VIII. But the Courts of Equity would not allow a man to take more than in conscience he ought, viz., his principal, interest, and expenses ; and the law was made conformable to this equitable construction by 4 and 5 Anne, cap. 16. The English penal bond, characterized by Mr. Ross as "that monster in practice," maintains its place to this day. It consists of a bond, as we have said, for double the amount of the loan, with a condition subjoined, to the effect that, upon payment of the real amount and interest, the bond shall be null. It is the condition adjoined which discovers the true nature of the transaction.

The progress of sentiment and of legislation in Scotland kept pace very closely with what we have seen in England. The illegality of usury is shewn by the forfeiture of the goods of the person offending to the Crown. In the beginning of the 15th century, the Roman law had become the prevailing jurisprudence of this country, and it was the pride of the Churchmen, who were the Conveyancers of that age, to transfer into the instruments framed by them the forms and subtleties proper to the Civil Law, to which circumstance is attributed much of the redundant and tautological phraseology in which some of our deeds are couched. The bond without any allusion to interest, but with the penalty of double the amount upon failure, is found in our ancient practice, and it appears from two decisions, noted in Balfour's Practicks, dated in the years 1501 and 1506, that the penalty was, upon non-payment of the principal in terms of the bond, rigidly enforced. But in 1548 another decision, reported in the same work, shews the penalty in a bond restricted to the amount of the creditor's interest or damage, while a subsequent report proves, that in 1561 interest was still rigidly disallowed, whether stipulated in money or in grain. Commerce in money being impatient in Scotland also of the restraints imposed by the Usury Laws, various means were devised for effecting loans by methods not obnoxious to the condemnation of these laws. Among these, the chief was the sale of annuities and other annual rights out of land. But, in 1587, an Act was passed by the 11th Parliament of James VI., 1587, cap. 52, permitting interest at the rate of £10 *per centum per annum*, or five bolls of victual ; and the Act 1594, cap. 226, made usury (i.e. the

INTEREST
LEGALISED IN
SCOTLAND.

exaction of more than 10 *per cent. per annum*.) punishable by forfeiture of the capital sum. It is worthy of remark, that in the next year we have a case reported, *Craven v. Wilson*, July 1595, in which a bond for a penal sum of £50 having been given for a loan of £30, the whole penal amount was decerned for. The creditor was an Englishman, and the decision occurring after that mentioned by Balfour in 1548, may probably be attributed to the admission in this particular case of the rule followed by the English Law Courts.

PART II.
CHAPTER I.
M. 16,405.

The Romans termed their evidences of debt "*nomina debitorum*," THE TICKET. from the circumstance, that the names of their debtors were inscribed upon the upper part of their deeds. The first instruments used in this country, as obligations for the payment of money under a penalty, were not intended for permanent securities, the creditor's dependence being placed upon the penalty or upon a pledge. These instruments were of the simplest description, and were called bills in England—in Scotland, *tickets*. The form of the ticket was this: "*I, A. B., grant me to be justly addebted to C. D. in the sum of £300 Scots, which I bind and oblige me, my heirs, successors, and executors, to pay to the said C. D., his heirs or assignees, or any having his order, and that against the day of next, under the penalty of £50 Scots in case of failure. In witness whereof,*" &c.

The Moveable Bond.—To the ticket succeeded the moveable bond. THE MOVEABLE BOND. And, after the allowance of interest by the Act 1587, a clause of annual-rent was introduced into the bond, which also contained a provision, that the creditor should have power at any time to crave his principal sum without requisition. The latter clause was imported from the heritable bond, in which there were inserted, after the allowance of interest, both a clause of annual-rent, and a power to demand the principal upon forty days' requisition. Such a power had been incompetent, before interest was made legal, from the nature of these heritable securities, which were ostensibly completed sales of annual-rent, with which a condition for the repayment of the price would have been inconsistent. The terms of the heritable and moveable bonds are particularly described in Hope's *Minor Practicks*; and it is necessary to mark Title iii. sect. 2. the effect produced by the introduction of the clause of annual-rent into the moveable bond. Previously this deed constituted a moveable right from its own nature. We have seen, however, that the Law of Scotland regards as heritable all rights involving a tract of future time; and upon this principle, as well as the partiality with which heritable rights were then regarded, the Judges, after great perplexity and many contradictory decisions, as described by Sir Thomas Hope in the passage to which we have referred, at last came to regard all bonds bearing a clause of annual-rent, although they contained no obligation to infeft, as *feuda pecunie*, and, therefore,

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BONDS BEARING
ANNUAL-RENT
COME TO BE
CONSIDERED
HERITABLE.

heritable. This was adopted as the leading principle, although subject to certain qualifications, the criterion, in judging whether a bond was moveable or heritable, being the intention of the creditor to let the money lie at interest. Thus, a bond bearing interest with a fixed term of payment was moveable, until that term was passed; because there was no legal presumption, until the term had passed without payment, that it was the creditor's intention to leave the money bearing annual-rent; and upon the same principle, if interest was payable before the capital, the bond became heritable after the term of payment of the interest; and, if the term of payment was distant, the bond was reckoned heritable from the first, the creditor's intention being apparent to employ his money long at interest. In all cases, bonds were heritable after the term of payment of the capital, and remained so, until requisition was made, or a charge given, for payment of the capital, which shewed the creditor's intention to convert the money into a moveable form. When it was the creditor's desire to give the bond to his heir at all hazards, it was in his power to avoid the risk of its becoming moveable through his death, by taking it payable to his heirs secluding his executors. The construction, thus imposed upon bonds bearing interest, was attended with great hardship to the younger branches of families, whom, in compliance with the feudal notions, it impoverished, in order to aggrandize the heir; and an Act was passed in the rebellious Parliament 1641, No. 85, to correct the evil. This statute was entitled an "Act in favor of orphans, fatherless, and others;" and it proceeded upon a narrative of the many pitiful effects daily found and increasing anent the misery and poverty of orphans and fatherless children, occasioned by the ignorance of parties taking bonds, &c., with clauses of annual-rent, in order that the principal sum might not remain unprofitable, but not intending that such securities should belong to their heirs to the prejudice of their bairns and other nearest of kin; that, notwithstanding, such securities were interpreted to be heritable, and pertain to the heir, whereby the rest of the children and nearest of kin were left pitifully unprovided, brought to great poverty and misery, and forced to become beggars. This Act was rescinded at the Restoration, but the remedy which it provided was, with some variation and improvement, revived by the Statute 1661, cap. 32, which ordains that all contracts and obligations containing annual-rent, shall be interpreted to be moveable bonds, unless they contain an obligation to infeft, or be conceived in favour of heirs and assignees secluding executors; in either of which cases the sum is to belong to the heir, otherwise they are to appertain to the nearest of kin and the defunct's executors and legatees, according to the law and practice of moveables. The same statute, however, declares that bonds bearing interest shall remain heritable *quoad fiscum*, thus

Folio Acts, p.
499.

ACT 1661. c.
32, PROVIDES
FOR THE PER-
SONAL BOND
BELONGING TO
THE EXECUTORS.

EXCEPTIONS TO
THE ACT.

exempting the bonds of denounced rebels from forfeiture to the Crown by single escheat; and it also exempts such bonds from the claims of the wife *jure relictae*, and of the husband *jure mariti*.

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We see then, that it is by the force of statute, that bonds bearing a clause of interest are moveable as regards the next of kin. Debts, which carried interest *ex lege*, and not by paction, were always moveable, for the same reason as bonds not bearing interest, viz., that there was no room to presume the creditor intended them to lie long at interest.

We are now better prepared than we should have been without these introductory remarks, to examine the terms of the personal bond. In commenting upon this and other deeds, we shall generally make use of the Styles published by the Juridical Society.

Personal bonds are either for the payment of money, or *ad facta præstanda*. We shall examine the money-bond first, as the most simple. In this deed the obligation to pay is the main and essential part, but the common form consists of four clauses—

PERSONAL BOND
FOR PAYMENT
OF MONEY.

- (1.) The narrative, or cause of granting.
- (2.) The obligation.
- (3.) A consent to registration; and
- (4.) The testing clause.

1. *The narrative*.—The deed commences with the granter's name and designation, which should be so explicit as to distinguish him from all others. The want of a designation, or of a sufficient one, will not annul the deed, but it may render an action necessary, in order to prove the identity of the granter. See an example of this in *Milne v. Murray*, 15th February 1665. In a loan, the cause of granting will be an acknowledgment of the money borrowed:—"I, A., grant me instantly to have borrowed from B. the sum of £1000 sterling, whereof I hereby acknowledge the receipt, renouncing all exceptions to the contrary." If the money has been received previously to the date of the bond, instead of the word "*instantly*," the term or day, upon which the sum was got, should be inserted, which thus fixes the period from which interest begins to run. A bond, stipulating interest from a prior date, was found not to be usurious, it being presumed, although not mentioned, that the principal had been then advanced; *Scot v. Baillie*, 7th November 1711. The acknowledgment of receipt, and renunciation of objections, are expressions derived from the Civil Law. Under the contract of *mutuum*, where it referred to money, the part of the lender was to pay the sum, and the acknowledgment of receipt of it was the evidence that his part of the obligation had been performed. But, in case the obligation might fall into the lender's possession before the money was paid, he was allowed a certain time to prove the objection *non numeratæ pecuniæ*—that the money

THE CONSIDER-
ATION.

M. 11657.

M. 16420.

EXCEPTION *non
numeratæ pecu-
niæ*.

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CONSIDERATION
OF BOND, *contd.*

had not been told or paid to him. It is to this objection that the renunciation refers.

We must keep in view as a general rule, that the greater part of our styles in writs regarding moveables are derived from the Civil Law ; while those relating to land-rights have their source almost entirely in the feudal customs.

In some forms there is a mere acknowledgment of being "*addebted* " and owing," without specifying the origin of the debt. But the style we have quoted is more eligible, because it gives the history of the transaction, and shews that the bond is granted for an onerous consideration. It excludes also the allegation, that the bond is for a former debt ; and, in order the more effectually to exclude such questions, where there have been previous transactions between the parties, and other debts are owing by the granter to the same creditor, it is advisable to insert such a statement, as will shew that the bond is for a new and additional debt, and not a security for a previous one. The acknowledgment and discharge complete the lender's part of the contract ; and then comes—

OBLIGATION OF
THE BORROWER,
AND HIS REPRESENTATIVES.

2. *The obligation of the borrower.*—It is in these terms :—" *Which sum of £1000 sterling I bind and oblige myself, my heirs, executors, and successors, to repay to the said B., and to his heirs, executors, or assignees.*" It is this clause, which gives to the bond its distinctive character and effect, as the instrument by which a debt is constituted in a valid form, so as to subsist until discharged, or extinguished by prescription. A mere statement in the narrative of an abortive security, that a debt existed thirty-seven years before, but without an obligation to pay any sum, was held not to be equivalent to a bond, and insufficient to prove the subsistence of the alleged debt, in *Hamiltons v. Hope*, 26th March 1853. In this case it was observed by Lord FULLERTON, that an I. O. U. is evidence of a debt at its date ; but that we have very little information as to the principles of law upon which such a document is to be dealt with, or how long it will subsist. The obligation is by the granter and those who will represent him after his death. By law, a creditor has recourse against all the representatives and property of his debtor. But there are certain principles—and a certain order—according to which the liability of the different classes of heirs is determined. The heir-at-law, who succeeds to the heritable property, is primarily liable for debts which by their nature are heritable, and the executors are liable for those which are moveable. There are also different degrees of liability amongst heirs in heritage. The heir of line is liable first ; he is also called the heir general, because he succeeds to all the property not given to another, and, therefore, represents generally the ancestor, and is primarily liable for his debts. The heir of conquest is next liable, on account of the generality of his succession ;

15 D. 594.

ORDER OF LIABILITY AMONG
THE BORROWER'S REPRESENTATIVES.

and after these the heirs of provision, as heirs-male, or of a marriage, or heirs of tailzie, who succeed only to the subjects provided to them; and these also are liable according to the more or less general character of their succession, the heir of tailzie, or other heir of provision to a particular subject, not being liable until after those whose succession is of a more extensive kind. A creditor has the option of proceeding either against the heir or against the executors;* but, if he prefers calling the heir, he must take the different heirs in the order which we have mentioned, the remoter heirs having a right to what is called the privilege of discussion—that is, to have those primarily liable sued for the debt, before a demand is made upon themselves. This is a privilege derived from the Roman Law in regard to the liability of principal and cautioners, which we shall afterwards have occasion to explain. Discussion amounts to this, that not only must the party first liable be called in an action, and decree obtained against him, but also that complete diligence must be executed against his personal estate, and his heritable estate adjudged; *Edgar* M. 3576. v. *Craigmillar's heirs*, 22d March 1627. In some bonds, the whole of these classes of heirs have been anxiously enumerated, and the privilege of discussion renounced, in order to give the creditor direct recourse against any one representing the debtor. But this is a form to be resorted to only in very special circumstances; and the common style already quoted effectually secures recourse against every representative and all the property of the debtor. Wherever there is any probability that it may be useful, the debtor should be made to renounce on behalf of his heirs the privilege of discussion, which will obviate the trouble and expense of suing an heir first liable but unable to pay, and will give immediate recourse against any remoter heir who has the means. Of the practical application of the right to require discussion there is an example in *Burnett v. Burnett*, 4th 16 D. 780. March 1854—a case which illustrates the doctrine, that, when *per expressum* one part of an obligant's estate is bound only *subsidiarie*, the representative in that part is entitled to require discussion of the remainder of the estate. Thus in an entail bonds of provision were narrated, with a declaration that the entailor's whole other means should be applied in payment in the first place, and that the entailed lands and heirs of entail should be liable only *subsidiarie*. The heir of entail was found entitled to demand discussion of the entailor's other estates, before subjecting him or the entailed lands. But, while all the heirs are liable, those not primarily liable are released, if the creditor accepts the obligation of the heir who is the proper debtor without any demand upon the others. Accordingly, in a case where

* In the *British Linen Company v. Lord Reay*, 28th May 1850, it was held that an 12 D. 949. action of constitution of a personal debt can be insisted in against the heir of the deceased debtor, without calling his executors.

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17 D. 487.

OBLIGATION BY
THE BORROW-
ER'S SUCCE-
SSORS.

M. 5911.

THE SUM IN A
BOND.

1621, c. 28.

CREDITOR'S
NAME.
1696, c. 95.EXECUTOR IS
hæres in mobi-
libus.
12 D. 97.M. 5429.
EXCLUSION OF
EXECUTORS.

the creditor transacted with the general representative, receiving his bond of corroboration and payment of interest during a series of years, thus accepting of him as his debtor, the ancestor having left sufficient funds, such creditor could not afterwards go against another heir liable *subsidiarie*; *Threipland v. Campbell*, 23d February 1855.

The word "*successors*" in the obligation means such representatives as take the succession, not by the operation of law, but by a special conveyance.

In the case of the *Lord Justice-Clerk v. Hamilton*, 21st January 1708, it was objected to a bond, that the debtor bound his heirs and successors, but not himself. This objection was based upon the authority of a title in the Civil Law, which made void all obligations not beginning a *defuncto*; but it was disregarded.

The sum in the bond is the amount owing, which is called the principal sum, or the capital, from *caput*, which in the Roman Law has that meaning. By the Act 1621, cap. 28, it was made lawful to add to the principal the interest until the term of payment, provided neither principal nor interest was exacted before the term. The object was to make the interest as well as the principal bear interest from the term of payment. This Act is one of those repealed by 17 & 18 Vict., cap. 90. But the same may still be done, when it is intended to add the first term's interest to the loan. The obligation is "*to repay*." In the old styles the word "*deliver*" was added in conformity with the contract of *mutuum*, in which the borrower's obligation was to re-deliver as much of the same article as he had received. The creditor's name, we have already seen, must be inserted, the Act 1696, cap. 95, declaring writs subscribed and delivered blank to be null. Although the creditor's heirs or executors be not specified in the bond, it will nevertheless descend to his executors, in terms of the Act 1661, cap. 32. And if the bond be taken to the creditor and his heirs, without naming executors, still it will descend to the executor, he being *hæres in mobilibus*. The word "heir" is a generic term, and the executor is the heir in that kind of property under which the moveable bond is classed; see *Blair v. Blair*, 16th November 1849. If a bond were taken to a party and his heirs-male, that would exclude the executor, because here, instead of the general terms, there is used a term so qualified as to define a particular class of heirs; and, as there is, therefore, no room for the presumption that the executor is meant, he is as effectually excluded as if it had been done by express words. But, whenever there is room for the presumption, the bond will be accounted moveable; and this was held in the case of a bond payable to a party and the heirs of her body, which was decided to be moveable, and so transmissible by testament; *Duffs v. Duff*, 5th June 1745. But, if it is the creditor's wish, that the bond descend to his heir-at-law, the Statute of 1661

points out the way to accomplish this, viz., by making it payable to the creditor and his heirs, *secluding executors*. These words render a bond for money heritable *sua natura*; *Ross v. Ross's Trustees*, 4th July 1809. In this case it was decided, that a bond taken to the creditor and his heirs and assignees, secluding executors, could not be transmitted by an English testament, although moveable property in Scotland may be conveyed by such an instrument—because a bond secluding executors is by its own nature heritable. This decision is in opposition to the opinion expressed by Mr. Erskine. If it is wished that the heir of line should succeed to arrears of interest due at the creditor's death, this may be effected by adding after "*secluding executors*," the words, "*from the said principal sum, and interest thereof*." This gives to such bonds a character more extensively heritable than the ordinary heritable rights of land, which do not preclude the executor from receiving arrears of rent due at the ancestor's death; and bonds secluding executors are not subject to the ancient rule, which suspended the heritable character of bonds until after the term of payment, but on the contrary they are heritable from their date; *Muir v. Muirs*, July 1687. It is also to be carefully kept in view, that if an heritable right of any kind be conveyed in the bond as a security, that changes the nature of the bond, and converts it into an heritable right. In *Fraser's Trustees v. Fraser*, 12th July 1749, the sum contained in a moveable bond was held heritable, because the debtor had assigned in security of it a portion of a separate heritable security belonging to him; and in *Watson v. Macdonald*, 5th December 1794, personal debts were found to be heritable, because a lease of land had been assigned in security of them.

As, before the Act 1661, bonds, though bearing clauses of annual-rent, were held to be moveable before the term of payment, so, although the *jus relictæ* was excepted from the operation of those Acts; yet, if the husband die before the term of payment, the bond is still considered moveable, and subject to the widow's claim; *Meuse v. Craig's Executors*, 22d November 1748. The Act 1661 was thought to have nothing to do with the question; for, although thereby obligations for money were made moveable to certain effects, which before were to all effects heritable, it left everything moveable which before was so. The same rule, of course, applies also to the husband's claim as regards bonds payable to the wife. The effect of the clause of interest in changing the nature of obligations is strikingly exhibited in *Ross v. Graham*, 14th November 1816. In this case A. granted to B.'s trustees a general obligation to pay B.'s debts, whereof one was heritably secured. This general obligation was decided in the Court of Session and House of Lords to be moveable, and, therefore, payable out of A.'s personal estate, so as to diminish his widow's claim under

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CHAPTER I.

F. C.

BONDS SECLUD-
ING EXECUTORS,
contd.

Inst. ii. 2, 12.

M. 5524.

BONDS CON-
TAINING AN HE-
RITABLE SECU-
RITY.

M. 5491.

M. 731.

EFFECT OF
CLAUSE OF INTE-
REST IN CHANG-
ING CHARACTER
OF THE PER-
SONAL BOND.

M. 5506.

F. C.

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CHAPTER I.

her *jus relictæ*. But, besides the general obligation, A. granted a bond of corroboration of one of the debts, and because the bond of corroboration contained a clause of annual rent, it was found to be heritable *quoad* the widow, and so not to affect the *jus relictæ*.

DATE OF PAY-
MENT OF BOND.

3. *The date of payment.*—"At the term of Martinmas next." Formerly, when interest was illegal, and the creditor had to look to the penalty in the bond for his profit, the term of payment was made very short, in order that the penalty might be soon exigible. A strong reason, which still exists, for naming an early term of payment is, that, until the term is passed, the debt is not due, and the bond, therefore, will not serve, if necessary, as a ground to secure payment out of the debtor's moveable estate in his own possession, which is carried by priority of diligence. The practice is to make the sum payable at the first term after the transaction.

OBJECT OF THE
PENALTY IN THE
BOND.

4. *The penalty.*—"With the sum of £200 sterling of liquidate *penalty in case of failure.*" We have seen that the penalty was originally introduced as a covert method of obtaining profit upon money before interest was allowed by law. In old bonds the amount of the penalty is various; sometimes extending, as in the English penal bond, to double the principal. But, now that the exaction of interest is legal, the insertion of a penalty has no reference to that purpose. The profit upon the loan is secured by the obligation of interest. The penalty, therefore, is intended to cover the damages which the creditor may sustain by failure of payment. It is called *liquidate* penalty, because it is an ascertainment, constituted in a liquid form, of what the creditor may demand in name of damages for non-payment. We say, of what the creditor *may* demand, because he is not entitled as a matter of course to recover the amount of the penalty specified in the bond. On the contrary, since interest was permitted by the Act 1587, the penalty has been held by the Court to relate merely to the expenses which the creditor may incur in the steps necessary to enforce payment, and as an expedient to facilitate the recovery of those expenses. It must be regarded, therefore, as clearly fixed, that the penalty specified in a bond is always restrictable to the amount of the expenses incurred in enforcing payment. There is no law or regulation determining the amount of the penalty in proportion to the principal sum. By 1672, cap. 19, anent adjudications, it was enacted that the creditor should have adjudged to him as much of his debtor's lands as should be equivalent to the debt and interest, with a fifth part more in respect the creditor wants the use of his money, and is necessitated to take land for the same. This proportion of one-fifth is supposed to have been the average amount of the penalties then in use to be taken. And, after the passing of this Act, it was adopted by practitioners as a rule, and has since been confirmed by the general practice. The Court of Session, under their

mixed jurisdiction of law and equity, make the penalty subject to the exercise of their *nobile officium*, and limit the creditor's demand under it to his expenses actually incurred. But, although the Court thus modifies the penalty, it will not supply one where it is omitted; *Leslie*, 6th January 1705. A penalty ought always, therefore, to be inserted in bonds, as it insures ready execution for expenses, and for this other reason also, that, if a suspension of a charge upon the bond is brought, the expenses being through the medium of the penalty liquidated as well as the principal sum, the caution found in the suspension will cover the expenses as well as the capital. The question here occurs, At what point is the penalty incurred? The bond says "*in case of failure*"—that is, by the literal interpretation, if the principal be not paid at the specified term. But it is rarely or never contemplated by either party that payment shall either be asked or made at the term specified. When, then, is the failure incurred which brings the penalty into effect, and how is it to be ascertained? The answer to this question will be obtained by referring to the old style of the moveable bond, being the first writ in Dallas's system, where the penalty (which is there called liquidate expenses) is made payable "*in case of failzie, or registration of thir presents in our default.*" The alternative here, viz. registration in default, is explanatory of the term "*failure*;" and this, therefore, is, in the ordinary case, the point at which the penalty begins to be exigible, viz. the placing the bond upon record, which is a judicial procedure towards enforcement of the obligation. The expenses which fall under the penalty, and are recoverable by virtue of it, are ordinarily the common expenses of diligence. When, therefore, a bond has been the subject of litigation, a decree, finding the debtor liable in the sums contained in the bond, principal, interest, and penalty, does not entitle the creditor to recover the expenses of the litigation, unless he obtain a special decerniture for these; *Gordon v. Maitland*, 27th November 1761. Here there was an appeal to the House of Lords, which pronounced an affirmance of a decree for the sums in a bond, with a fifth part more of penalty in terms of the bond. The Lords allowed the expense of the diligence used in putting the decree into execution, but suspended the letters *quoad* the remainder of the penalty. The case of *Young v. Sinclair*, 21st May 1796, is to the same effect. And when, in a suspension of a charge given for principal interest and penalty, the letters are found orderly proceeded—that is to say, when the charge is sustained as regular and not liable to suspension—if the debtor shall thereupon tender payment of principal, interest, and the necessary expenses, and that offer be refused, the refusal is a ground for a second suspension; *Cowper v. Stuart*, 4th January 1740. When,

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M. 7429.

RESTRICTION OF
PENALTY TO
THE NECESSARY
EXPENSES OCCA-
SIONED BY DE-
FAULT IN PAY-
MENT.

M. 10050.

M. 10053.

M. 10044.

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CHAPTER I.
PENALTY, *contd.*

M. 10052.
4 S. 737.

4 S. 113.

p. 151.

decerned for. The penalty is not necessarily limited to the mere charges of diligence, but will be held to cover other expenses properly incurred, as, for instance, the expense of defending a bond against a third party, which may be recovered under the penalty from the proper debtor, although the third party was not found liable in expenses; *Allardes v. Morison*, 19th June 1788; *Ramsay v. Goldie*, 22d June 1826; and, where a cautioner has paid a debt and interest, he is entitled under the penalty in the bond to recover interest upon the interest he has paid, as well as the expense of the assignation by the creditor in his favour; *Inglis & Weir v. Renny*, 23d June 1825. The use of the penalty in a bond, therefore, is simply to afford the means of recovering the expense of enforcing the obligation, and obtaining indemnification. It need scarcely be remarked, that the penalty is additional to, and corroborative of, the principal debt, and not an alternative allowed to the debtor, although by the note of a case preserved in Balfour's Practicks, it appears to have been ingeniously contended, that, by paying the penalty, the debtor was released from the obligation for the principal.

OBLIGATION TO
PAY INTEREST.

5. *Interest*.—We have next that part of the obligation which provides for the payment of interest:—"And the legal interest of the said principal sum from the date of these presents (or from such prior date of payment as may have been already mentioned) to the foresaid term of payment, and thereafter during the non-payment thereof, and that at two terms in the year, Whitsunday and Martinmas, beginning the first payment of the said interest at the said term of Martinmas next," (i.e. at the term already fixed for payment of the principal sum,) "for the proportion thereof which shall be due at that term, and the next payment of the same at the term of Whitsunday 18, for the half year immediately preceding, and so forth by equal portions at the said two terms, yearly, termly, and continually thereafter, so long as the said principal sum shall remain unpaid."

LEGAL INTER-
EST.

The usury laws having been repealed by 17 & 18 Vict. cap. 90, there is now no limitation in the rate of interest which may be stipulated upon a bond or other security. Formerly five *per centum per annum* was the legal rate. Now, the rate must in every case depend upon the amount stipulated for in contracting the loan. Interest is due from the term stipulated in the bond, and, if the debtor fail or refuse to pay, he is liable in interest upon the interest not paid from the date of a judicial demand followed by the proper diligence; *Findlay*, 10th February 1849. In that case, a party brought a suspension of a threatened charge for arrears of interest upon a bond, and he consigned the sum in bank. The Court having sustained the charge nearly to the full amount of the interest claimed, it was held that the charger was entitled to interest upon the consigned sum, and

11 D. 569.

that it should be legal, and not merely bank interest.* By the general rule, interest is not allowed upon interest, and this rule is only avoided by a judicial or voluntary act. The cases in which accumulation takes place so as to make interest run upon interest, are stated by Mr. Bell in his Commentaries. They consist of judicial sales, in which the debts and interest are held as accumulated at the date of payment of the price—of money in the hands of trustees, agents, tutors, and others who are bound in duty to accumulate—of voluntary corroboration, adding interest to principal—of denunciation, as we shall afterwards see—and of adjudication. These, and the payment of interest by a cautioner, are the only instances in which interest is allowed upon interest; *Jolly v. M'Neill*, 28th May 1829. 7 S. 689. The same doctrine will be found in the previous case of *Duke of Queensberry's Executors v. Tait*, 23d May 1822, which illustrates also this qualification of the general rule, viz. that, where a debtor is entitled to retain interest in security of counter claims, he will not be allowed to make the right of retention a source of profit to himself, but will be held bound to account for the interest, on the same footing as if it were paid, or were in the hands of a third party who would account as agent. In such circumstances, therefore, accumulation will be allowed. I. p. 651. F. C.

The only other words requiring remark in this part of the bond are, "yearly, termly, and continually." The practice of requiring payment of interest half yearly is comparatively recent. Formerly the annual rent was levied but once a year, and bonds stipulating the payment yearly are still occasionally met with. The word "continually" was introduced by the anxiety of Conveyancers to avoid the effect of the strict interpretation of obligations under the Civil Law, and the risk that, in any circumstances, the payment of interest for a broken part of a year or half year might be objected to. But there INTEREST RUNS de die in diem.

* In an accounting, where all liability had been denied, the Court accumulated the principal and the interest found to have been due at the date of citation, and allowed interest upon the accumulated sum from that date, though the conclusions of the summons did not cover the demand. The Court, however, refused to give biennial rests after the date of citation, rests being of a penal nature, and not to be enforced where the litigation is not vexatious; *M'Lean v. Campbell*, 15th February 1856. In the case of *Napier v. Gordon*, 3d October 1831, interest upon arrears of interest was allowed from the next term after the date of citation. The Lord Chancellor observed:—"I cannot perceive the difference between the liability to pay interest, where A is indebted to B for interest upon money due, and the liability to pay interest upon interest, where A owes B money plus the interest. You may call it compound interest; it is perfectly immaterial as to the Law of Scotland." . . . "The party refusing payment upon the citation has put himself in *morá*, and is just as much liable to pay interest upon interest as upon the principal, or any other debt which one man owes another." . . . "In Scotland it is not because it is interest, but because it is the subject-matter of the action, that the Scotch Law gives interest (contrary to the principle of the English Law.) from the instant that the party, being called upon to pay, and who ought to pay upon citation, refuses to pay, and thereby becomes in *morá*." 5 Wil. & Sh. App. 745.

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CHAPTER I.
M. 11648.

1 S. 212.

15 D. 712.

CONSENT TO
REGISTRATION.

is no doubt that *ex lege* interest continues perpetually due, while the principal remains unpaid; *Pourie v. Dykes*, 2d February 1667; and that it runs *de die in diem*, and will be made so payable whenever the agreement of parties to pay termly shall cease or fail. If a bond were written without stipulating interest, the Court would decide according to the circumstances, and award interest notwithstanding the silence of the bond, if there were grounds for presuming such to have been the parties' intention; *Cunninghame v. Cunninghame*, 13th December 1821. It may be noticed here that the penal interest imposed by the Pupils' Protection Act, 12 & 13 Vict. cap. 51, is imperative, and the Court has no power to remit it; *Ballingal*, 3d June 1853.

6. *Clause of consent to Registration.*—We come now to the consent to registration. Having already fully treated that subject, it is unnecessary here to say more than that the purpose of registration in this case will be for preservation, and also for execution; and a charge of six days must be consented to, otherwise the debtor will be entitled to fifteen days' charge, the shorter *induciae* introduced by 13 & 14 Vict. cap. 36, not being extended to diligence on decrees and registered protests, excepting in edictal citations. As the Personal Diligence Act, 1 & 2 Vict. cap. 114, although it directs a warrant of execution to be embodied in the extract of the deed, yet permits parties to proceed by the old method of letters of horning and other separate steps of diligence, if they think fit, the old form of this clause, viz. "*that letters of horning on six days' charge, and all other legal execution,*" &c. may still be used. But it is more in accordance with the present state of the law, resulting from the Act referred to, that the consent should be simply, that all legal execution may pass upon a charge of six days upon a decree to be interponed, &c.

7. *The Testing-Clause.*—Of this clause, also, we have already made a particular examination, and it is unnecessary to recapitulate.

Such are the terms of the personal bond in its simplest form, and it will be seen, that in every part it contains language, of which the precise import cannot be fully understood without legal knowledge and research. Its terms, by inveterate custom, although not by statute, have become fixed, and most of its words may be termed *voces signatæ*—words appropriated to the particular purpose which they serve in this instrument, and as to which the prudent Conveyancer will pause before substituting any others in their room. The form which we have examined is the simplest that occurs, being between a debtor and creditor, each acting for himself, and in reference to a distinct loan.

Variations in Bonds.—Let us now look at the variations which

occur, and, *first*, at those which arise from a peculiarity in the position of the granter, as not acting for himself individually, but under powers, judicial or voluntary, on behalf of another.

PART II.
CHAPTER I.

(1.) *Bond by a Tutor.*—This is a deed not likely to occur in its strict form, obliging the pupil only, on whose behalf the money is borrowed. The tutor cannot bind his pupil so as to exclude him from challenging, after he shall have attained majority, every deed granted by his tutor on the head of minority and lesion. A bond by a tutor, therefore, binding his pupil alone, would not only be subject to challenge, but must be regarded as incapable of enforcement during the pupil's minority, and until after the *quadriennium utile*. But the tutor, or some other person, interested in the pupil and having confidence in the tutor's management, may be willing to be bound personally on his behalf. And, in this case, it is still proper to construct the bond so as to oblige the pupil himself, since the loan is truly on his account, in order to serve as evidence to that effect on behalf of the party thus becoming bound. In these circumstances the bond will be granted by the tutor, adding to his proper designation his character as tutor, with a reference to the authority under which he acts, whether that be nomination in a deed of settlement, a gift from Exchequer, or service as tutor of law. It must narrate the occasion for borrowing the money, in order to shew that it was *in rem versum*. It then acknowledges receipt of the money for the use and behoof of the pupil, and the tutor binds the pupil, (who must be properly designed,) and his heirs, executors, and successors; and the tutor or other obligant will bind himself and his heirs, executors, and successors. If the tutor is the other obligant, especial care must be taken, that he is bound, not merely as tutor, for that obligation would only affect the pupil's estate, but as an individual; and, in order to make this perfectly clear, the narrative should state his intention to become bound not only as tutor but also personally and individually for the creditor's greater security. A clause may be inserted, binding the tutor to procure a ratification of the bond by the pupil, when he shall attain majority, or by his heirs and executors in the event of his death. In order effectually to exclude the objection of lesion, it is very advisable, that the tutor or the creditor preserve evidence of the application of the money—such as receipts for board, education, clothing, &c. This deed is not subscribed by the pupil, but by the tutor on his behalf.

FORM OF BONDS
BY TUTORS.

(2.) *Bond by a Minor, and his Curators.*—The remarks just made with regard to the hazard incurred by a creditor lending to a pupil, apply also to the bond of a minor with or without curators. The deed is granted by the minor himself, with advice and consent of his curators, who must be named and designed, and the deed or nomination under which they act referred to. The bond will run in the

FORM OF BONDS
BY MINOR AND
CURATORS.

PART II.
CHAPTER I.

names of the whole curators, and also of the whole tutors in the case of a pupil, if there be more than one; but, if a quorum is authorized by the deed of nomination to act, then it is sufficient that it be subscribed by the limited number appointed as a quorum.

FORM OF BONDS
BY FACTORS.

(3.) *Bond by a Factor*.—A factor or commissioner cannot bind his constituent for money borrowed, without special powers to that effect. When such powers have been granted, as to the sufficiency of which the creditor must, of course, satisfy himself, the deed is in the name of the factor, whose power must be narrated, and particularly the special power to borrow money and grant bonds. He binds his constituent, who must be accurately named and designed, and his heirs, executors, and successors. In order to avoid any difficulty with respect to the competency of summary diligence against the constituent upon a bond granted by his factor, the factory ought to contain a consent by the principal party to the registration not only of the factory, but of the bonds to be granted by the factor by virtue of the power conferred on him, to the end that execution upon six days' charge may proceed against the constituent himself. In the bond the factor will, of course, consent to registration for execution against his constituent.

FORM OF BONDS
BY TRUSTEES.

(4.) *Bond by Trustees*.—Loans are not readily granted to trustees, if they be not specially empowered to borrow money. The nature of the trust, and its exigencies, may by implication raise a constructive power, but it is most satisfactory, that there be an express authority in the trust-deed, and this point ought to be carefully attended to in the preparation of trust-deeds under circumstances where it may become necessary or expedient to borrow. The bond is in name of the trustees, and is subscribed by the whole, or by a quorum, the power to a quorum being set forth. If the truster is alive, they will bind him, and, whether he is alive or not, they will bind themselves as trustees. Bonds by trustees do not furnish the means of personal compulsion, because a party bound as trustee is liable only to make the trust funds forthcoming. He is not liable to personal diligence under such an obligation; *Campbell v. Gordon*, 21st February 1840, affirmed 13th June 1842. Trustees, however, are personally liable to this effect, that, after granting an obligation to a creditor of the trust, which they have the means of paying, they are bound to preserve these means, and they will not be allowed afterwards to plead insolvency of the trust estate; *Thomson v. M'Lachlan's Trustees*, 24th June 1829. But, as bonds by trustees do not furnish the means of summary personal diligence, they are deficient in that which is generally the most effectual means of recovering payment in personal bonds; and the creditor may probably, therefore, require the trustees or others to become personally bound, in which case the deed must bear explicitly, that they are bound not only as trus-

2 D. 639.

1 Bell's App.
428.

7 S. 787.

tees, but personally or as individuals conjunctly and severally, and their respective heirs, executors, and successors. The meaning of the words, "conjunctly and severally," we shall shortly have occasion to explain.

PART II.
CHAPTER I.

(5.) *Bonds by Burghs and Incorporations.*—When there is occasion to transact a loan with a burgh or an incorporation, the constitution of the particular body must be examined, in order to ascertain its powers, and in what manner the body corporate may be effectually bound. In the case of a royal burgh, no loan can be contracted without a previous Act of Council authorizing it, in terms of the Statute 1693, cap. 28, and 3 Geo. IV. cap. 91, § 11, under the pain of nullity as regards the common good or corporate property, out of which, therefore, the lender cannot recover his money; but his recourse is reserved against the parties contracting, who, by the older statute, are made personally liable in their private fortunes to relieve the burgh. The bond is granted by the provost, bailies, dean of guild, and treasurer, with consent of the other members of Council, for themselves and for those other members, all as representing the community. It recites the Act of Council authorizing the contraction of the debt, and binds the granters, and their successors in office, as representing the community of the burgh. In this form the granters are only liable as long as they remain in office, and then only to the extent of the burgh's property. But the bond continues a good ground of diligence against their successors in office; *Lord Drumlanrig v. Bailies of Hawick*, 15th January 1624; *Bowie v. Wilson*, 7th February 1695; *Livy v. Mudie*, 6th August 1774. The expediency, therefore, of such loans as regards the security of the money lent, depends upon the amount of the corporate property; and sufficient data for forming a judgment as to that ought to be obtained in the annual accounts of the revenues, common good, and debts, which, by the Act 3 Geo. IV. above referred to, must annually be prepared and made accessible. If the magistrates or others are willing to add their personal security to that of the burgh, care must be taken to have them bound separately and distinctly in their individual capacities. In minor corporations, the bond will be granted by certain office-bearers named in the constitution, or in the act of the society authorizing the transaction; and the same rules apply in these cases, as in royal burghs, with respect to the restriction of the liability to the corporate property, and the necessity of specially obliging as individuals any parties willing to be personally bound. In such cases, however, the constitution of the body ought to be examined, and the deed made conformable in all respects to its provisions.

FORM OF BONDS
BY CORPORATE
BODIES.

M. 2509.
M. 2511.
M. 2512.

When parties, acting for others in any of the capacities to which we have referred, are not the granters, but the receivers of the bond,

PART II.

CHAPTER I.

VARIATIONS IN
BONDS, ARISING
FROM THE
CHARACTER OF
THE CREDITORS.

it will be made payable as follows, viz.,—In the case of a tutor the money will be acknowledged to have been paid by him as tutor, and the obligation will be to repay to the pupil, and his heirs, executors, and assignees, or to the tutor for his behoof. The bond to a minor and his curators will, in like manner, be payable to himself or his curators. The Juridical Society's styles contain the form of a bond to a factor, acknowledging receipt from him as factor, and binding the granter to pay to the constituent, or to the said A. B., his present factor, or to any other factor legally authorized to receive the same. This is a convenient arrangement, where the principal party is absent. When trustees lend money, it is unnecessary to narrate the terms of the trust-deed. The bond will acknowledge receipt of the money from them as trustees, and bind the borrower to repay to them, or to a quorum, or to their successors in office. The bond to a burgh or incorporation is made payable to the treasurer of the burgh, or boxmaster or treasurer of the incorporation, or to his successors in office, for the use and behoof of the burgh or incorporation. Other examples of variations in the style of the bond, arising from peculiarity in the position of parties, will be found given in the Juridical Society's styles—as, for instance, a bond to one in liferent and another in fee—a bond to a husband and wife in conjunct fee and liferent, and to a wife excluding the *jus mariti*. The terms and effect of such destinations as these will be considered, when we come to treat of settlements in contemplation of marriage and of death. In such cases, we may remark here, that it is frequently for the interest and convenience of all parties, including the debtor, that, where there is a liferent, there should be some party capacitated to receive and discharge the principal sum, should the fiar be incapable. The liferenter may himself be so empowered, and that will be proper, when it is his money that is invested. In such circumstances, there should be a declaration, that the liferenter by himself alone, and without the consent of the others named in the bond, shall have power to receive and discharge the sum, and to do diligence, in the same way as if he had been named fiar.

BONDS OF AN-
NUITY.

Bond of Annuity.—The bond of annuity, when the annuity is purchased, states the price as the consideration, and the granter binds himself, his heirs, executors, and successors whomsoever, to make payment to the grantee, "*during all the days of his lifetime, of an annuity of £100 sterling at two terms in the year, Whitsunday and Martinmas, beginning the first term's payment thereof at Whitsunday next, for the proportion of the said annuity to fall due from the date hereof to that term, and the next term's payment thereof at Martinmas thereafter for the half year preceding,*" &c. And there is stipulated a fifth part more of each termly

payment of liquidate penalty, and interest from the respective terms of payment.

PART II.
CHAPTER I.

Annuities being heritable, because they bear a tract of future time, and a yearly profit without relation to any capital sum or stock, it was formerly held, that, upon the death of the annuitant between terms, the annuity ceased as at the term preceding his death, because it did not become due *de die in diem*, like the interest of money, but was due in indivisible termly payments, and, if the whole termly payment did not become due by the creditor's survival, no part of it was exigible; *Colebrooke v. Gibson-Craig*, 14th 13 S. 756. May 1835. When it was intended, therefore, that a proportion should be payable from the last term till the day of the annuitant's death, express provision had to be made to that effect. But the Apportionment Act, 4 and 5 Will. IV. cap. 22, now renders exigible 4 & 5 Will. IV. a portion of an annuity for the period from the term till the death of c. 22. the creditor, including the day of the death. This act was held to extend to Scotland in the case of *Bridges v. Fordyce*, 7th March 6 D. 968, 1844, affirmed 23d February 1847. 6 Bell's App. 1.

Bonds by more than one person.—We are now to examine the rules which determine the effect of bonds granted by two or more persons. As obligations among the Romans were undertaken by certain *verba solennia*, and these obligatory words were, in the case of obligations by more than one person, pronounced by each obligant separately, it resulted, that each obligant was liable for the full amount of the obligation; in the words of that jurisprudence, they were liable *singuli in solidum*. The rigour of this rule was modified by the Emperor Hadrian, who conferred upon co-obligants thus bound, a privilege called *beneficium divisionis*, by which any obligant was entitled to require that the amount should be divided in equal shares among the whole parties bound, and each sued for his own share only. With us the co-obligants in a bond, which binds them simply without any words to indicate the extent of the obligation, have by common law the benefit of division. If the bond is for a sum of money, it is presumed that they have shared it equally, and they are liable *pro ratâ*—that is, each for his own proportion only; but if any obligant becomes bankrupt, the rest must in equal shares make up his part. As this rule takes its rise from the circumstance of the parties being joined in the same obligation, its effect is expressed by the word “*conjunctly*.” So parties bound conjunctly are only liable *pro ratâ*, and they cannot be sued separately in an action upon the bond for more than their respective shares. There is a case reported, *Sloan v. Macmillan*, 5th February 1751, in which the word “*conjunctly*” was held to import an obligation *in solidum*. The document here was a letter *inter rusticos*, and it was construed according to the presumed intention of the party.

FORM OF BONDS
BY MORE THAN
ONE OBLIGANT.

BENEFIT OF
DIVISION.

M. 14630.

PART II.

CHAPTER I.

JOINT AND
SEVERAL OBLI-
GATIONS.

But the established legal acceptance of that word is, that the whole obligants united undertake the obligation, and, therefore, that each is liable only for his share. The obligation is, therefore, the same, whether the parties are bound simply, or with the word "conjunctly" added. If it is intended to bind the whole obligants, not *pro ratâ*, but so that each shall be liable for the whole amount, that effect will be produced by binding them "*severally*." That word produces the same effect in a deed signed by more than one person, which resulted from the obligations pronounced separately under the Roman law. So, when two or more parties subscribe a deed, binding themselves severally, it is the same as if each gave an obligation bearing, that, although others were bound with him, he was himself liable for the whole amount. From this it results, that any one of obligants bound severally may be sued alone for the full sum. Although, therefore, it may not add to the ultimate security of the obligation, the word "severally" is very important in providing instant and effectual recourse against each party for the whole amount of the debt. The full liability of each obligant may be qualified, even when the word "severally" is used; but it will require express terms to do so, as in *Farquhar v. M'Kain*, 28th July 1638, where two parties being bound conjunctly and severally, "*ilk one for his own part*," the latter words restricted the liability of each to a half. The same result follows, if the parties are all bound as "*full debtors*," or "*as co-principals and full debtors*," each obligant being in that case also liable *in solidum*; *Dunbar v. Earl of Dundee*, July 1665. Parties bound together in a bond are liable *in solidum*, although not bound severally, or as full debtors, when the object of the obligation is not divisible, of which two examples are noticed by Mr. Erskine, viz., a contract for the transport of goods; *Grott v. Sutherland*, 14th June 1672; and an obligation to provide a militia-man; *Dickson v. Turner*, 24th November 1697. But, when the obligation is converted into damages for non-performance, it becomes divisible, and the parties are only liable *pro ratâ*; *Denniston v. Semple*, 15th July 1669. And, when the terms of the obligation are such as import a co-partnery between the co-obligants, they are liable *in solidum*, though not bound severally or as full debtors; *Mushet v. Harvey*, 16th December 1710. From favour to commerce also, acceptors and other obligants in bills and promissory notes are each liable *in solidum*, although it be not so expressed, as will afterwards be more particularly explained.

RELIEF AMONG
CO-OBLIGANTS.

As joint obligants are only liable *pro ratâ*, so they have a claim of mutual relief against each other. Any co-obligant, therefore, who pays a debt, is entitled to recover from the other obligants their share of the loss; *Carswell v. Irvin*, 15th January 1850. This right arises *de jure* by the mere fact of payment; and he who pays may, without obtaining any assignation, claim relief from the other obligants

M. 2282.

M. 3584.

M. 14,631.

M. 14,632.

M. 14,630.

M. 14,636.

12 D. 462.

to this extent, that every obligant remaining solvent must pay an equal share; *Craigie v. Graham*, 21st December 1710. When one of several obligants has paid his own proportion of the debt, he is entitled to call upon the others to pay their shares, so that the bond may be discharged; *Low v. Farquharson*, 8th February 1831. The creditor in a bond by several obligants bound conjunctly and severally may exact payment from any one of them. But, when an obligant has paid, and obtained an assignation, he cannot use his assignation, so as to defeat the right of each co-obligant to have the liability equalized among the whole of their number; neither can this equality be prevented by the interposition of a stranger on behalf of any *socius*; *Gilmour v. Finnie*, 11th December 1832.

PART II.
CHAPTER I.
M. 14,649.

9 S. 411.

11 S. 193.

A bond subscribed by several persons is generally for the benefit of one of their number, and the rest become bound, in order to give him the benefit of their credit. When the bond is in this form the party, on whose behalf it is granted, is called the *principal*, and those who become bound for him are termed cautioners. When parties are bound as cautioners, either in the same deed with the principal debtor, or by a separate deed, they are entitled to this privilege, that they may require the creditor, before exacting payment from them, to use the legal means of recovering the amount from the principal debtor. This results from the nature of the cautionary obligation, which imports that the surety is bound only *subsidiarie* to this effect, viz., that he engages to pay, if the principal obligant fail. The ancient Roman law did not admit of this distinction. By it, the surety (*adpromissor*) was liable immediately, as well as the principal debtor; but Justinian conferred this privilege upon those who were bound for the debts of others, viz., that the parties should be sued in the order of their liability—the principal first, and his sureties afterwards. This privilege is termed *beneficium ordinis*—with us, the benefit of discussion; and it, as well as the benefit of division, may be renounced either in express terms, or by the cautioners binding themselves as principals or as full debtors. But the privilege is available wherever the surety is bound as cautioner, and has not renounced it.

PRINCIPAL AND
CAUTIONER.

BENEFIT OF
DISCUSSION.

In order to discuss the principal debtor, it is not sufficient that the creditor merely ask payment. If the ground of debt be not liquid—that is, such as to give him immediate execution, as a bond with consent to registration for diligence, or a bill or promissory note—the creditor must constitute his debt against the principal debtor by a judicial decree, and then he must execute a charge against his person. This proceeded formerly upon letters of horning, after which the debtor was denounced as a rebel, and the denunciation recorded; and this is the point, at which the person of the debtor was held to have been sufficiently discussed; *Brisbane v. Monteith*, 24th July 1662. Now, by the 1st and 2d Vict. cap. 114, § 10, the recording of the execution

DISCUSSION OF
PRINCIPAL
DEBTOR.

M. 3588.

PART II.

CHAPTER I.

DISCUSSION OF
PRINCIPAL,
cont.
M. 3588.

of charge is declared to have the same effect, as if the debtor had been denounced rebel, and the denunciation registered. The debtor's estate, as well as his person, must be discussed, his moveables by poinding or arrestment and furthcoming, and his heritable estate by adjudication; *Milne v. Græne*, March 1684. The bankruptcy of the principal debtor is held to be sufficient discussion, because, his whole means being judicially transferred to his creditors, there is no hope of recovery by attaching his person, and no estate, real or personal, against which diligence can be directed. Absence from this country is also held to exempt the creditor from the necessity of discussing the principal debtor, if the latter has no estate, moveable or heritable, within the jurisdiction of our Courts. If the principal debtor be dead, it is still necessary to discuss his heir and his estate. The contrary was found in the case of *Wishart v. Wishart*, 16th May 1835, but the decision was reversed upon appeal, 12th May 1837. But, although the *beneficium ordinis* obliges the creditor to discuss the principal debtor, the cautioner may be sued in the same action with the principal, provided execution against the cautioner be superseded, until the principal is discussed; *Douglas v. Lindsay*, December 1662; *Primroses v. Commissary Clerks of Edinburgh*, 1st July 1737; *Macdonell v. Rankin*, 7th July 1829. An obligant upon a bill of exchange or promissory note cannot plead the *beneficium ordinis*, even although he be bound expressly as cautioner, because the legal rules applied to bills and notes do not admit of such a limitation of responsibility. Nor is one who undertakes to guarantee payment of a debt within a certain time entitled to require discussion of the principal debtor; *Galloway v. Robertson & Co.*, 1st July 1825. A bond by a third party to see rents paid during the currency of a lease is not properly a cautionary obligation, but is a guarantee, subjecting the granter to recourse if the rents are not regularly paid, without any previous proceeding by the creditor against the principal debtor. Such an obligant, therefore, is not entitled to the benefit of discussion; *Grant v. Fenton*, 22d February 1853. The same case shews, that such a guarantee, like the obligation of warrandice, does not make the granter liable for the expense of suing the principal debtor. In framing letters of guarantee, it is necessary to take care, that the nature and extent of the intended obligation be explicitly defined—where one, as taking burden for another, binds that other, that is only a guarantee of his power to bind the other. But where, as taking burden for another, one binds himself, that is a direct guarantee upon his part of the fulfilment of the obligation; *Mollison's Trustees v. Craufurd*, 11th June 1851. The granting of a guarantee is generally without consideration as between the granter and grantee. The granter, therefore, must be strictly liable in the precise terms of his obligation, otherwise it will not be binding. Every condition also which he stipulates must be fulfilled.

13 S. 769.

2 Sh. and MacL.
App. 564.

M. 8125.

7 S. 845.

GUARANTEES
NOT ENTITLED
TO PRIVILEGE
OF DISCUSSION.

4. S. 132.

15 D. 424.

13 D. 1075.

So, where the guarantee stipulated, that an invoice should be sent to himself, and that the goods should be delivered to a particular person, he was held free, neither of these conditions having been fulfilled ;

PART II.
CHAPTER I.

Thomson & Co. v. Breadalbane, 13th June 1854. A cautioner *ad factum* 16 D. 943.

præstandum cannot be subjected in payment until the principal be discussed, because the principal alone can do the thing for which the obligation is granted ; and no claim arises against the cautioner, until the principal has failed ; *Milne v. Græme*, already cited. From the nature of the bond of caution, which resolves into a separate obligation against each cautioner, it follows, that the cautioners may be sued separately for their respective shares, and that one or more are not entitled, when sued, to require that the others be made parties to the action ; *Macarthur v. Scott*, 15th December 1836. The same rule is strongly exemplified in *Richmond v. Grahame*, 8th February 1847, where a committee of certain subscribers having bound themselves, "as well as the whole other commissioners and shareholders, jointly and severally," the individuals bound *nominatim* were held liable to be sued without calling the other shareholders.

PRIVILEGE OF
DISCUSSION,
cont'd.

M. 3588.

15 S. 270.
9 D. 633.

As the sufficiency of bonds, executed by more than one person, may be affected by various objections relating to their constitution, or to the creditor's conduct in relation to the parties bound, it is necessary to refer briefly to these objections, in order that the precautions necessary to obviate them may be apparent. A cautioner is not bound, although he has signed the obligation, if the principal debtor has not signed it. This results from the nature of accessory obligations, which cannot take effect if the principal debt be not incurred ; *Crichton*, December 1612 ; and one is not bound, who subscribes in reliance upon the obligation of another, not being made aware that that other has already been discharged ; *Wingate v. Martin*, 4th December 1829. A surety has in equity and in law a claim of relief against the principal debtor, so as to recover from him whatever the surety may be compelled to pay on his account. He is, therefore, entitled upon payment to obtain from the creditor an assignment of his claim and right of action against the principal debtor. This right is called *jus cedendarum actionum* ; and the creditor, in order to preserve his recourse against the cautioner, must be able to assign his claim against the principal debtor. From this it results, that, if the creditor shall discharge the principal debtor, then his recourse against the cautioner ceases, because he cannot now transfer to the cautioner his right of action against the principal ; *Wallace v. Donald*, 13th January 1825. It is, therefore, necessary in discharging the principal debtor to stipulate expressly, that the discharge shall have no effect, if the cautioner shall thereby be liberated. An example of a discharge so qualified occurs in *Smith v. Ogilvie*, 22d November 1821. The cautioner's objection on this

CASES IN
WHICH CAU-
TIONER LIBER-
ATED BY CON-
DUCT OF THE
CREDITOR.

M. 2074.

8 S. 185.

*Jus cedenda-
rum actionum.*

3 S. 433.

1 S. 159.

PART II.

CHAPTER I.

2 S. 336.

LIBERATION OF
CAUTIONER BY
CONDUCT OF
CREDITOR,
cont^d.

11 S. 193.

15 D. 814.

12 S. 834.

15 S. 930.

M. 2073.

head is of course cut off, if he consent to the discharge of the principal debtor; *Fleming v. Wilson*, 24th May 1823. Here a cautioner was held to have consented by presiding at the meeting of creditors, at which it was agreed to discharge the debtor. A creditor may, however, discharge a principal debtor who has been sequestrated, without releasing the cautioner; 2 and 3 Vict. cap. 41, § 42. Upon the same principle, as cautioners have mutual relief *inter se* for whatever sum any one shall pay above his own share *pro ratâ*, it follows, that, if the creditor discharge one of several cautioners, he loses recourse against the rest for the discharged obligant's proportion of the debt, because to that extent he has cut off their relief; *Gilmour v. Finnie*, 11th December 1832. The co-obligant is thus relieved to the extent only of the discharged obligant's share, but the relief is thus limited, only when the period of the obligation has expired, and the debt become mature. If, during the currency of the period of the obligation, the creditor discharge an obligant without consent of the others, they are freed from their obligation altogether; *British Linen Company v. Thomson*, 25th January 1853. The cautioners are also discharged, if the creditor refuse payment when tendered; *Cooper v. Blakemore and Co.*, 27th June 1834; because he lies under an implied obligation not to prejudice the cautioners, and they would have been relieved by his taking payment. The cautioner is also discharged, if the creditor shall enter into an illegal agreement to his prejudice; *Lawson v. Coldstream*, 17th May 1837. The same general principle, that the cautioner's obligation is at an end, if the creditor by any act or neglect cut off or weaken his relief, is illustrated by numerous decisions, and in various ways. Thus, if he allow the debt to prescribe, the cautioner is free; *Halyburtons v. Graham*, 12th July 1735. A cautioner is released, if the creditor liberate the debtor after incarceration. This effect, however, does not follow in the case of liberation after apprehension, but before imprisonment. The creditor also loses recourse against the cautioner, if he discharge any security, for the cautioner's relief extends to the property of the debtor, and when any part of the debtor's estate has been appropriated as a security, the cautioner has an interest to require that it shall be made available, and, if the cautioner pay, he is entitled to receive an assignation of the security. If, therefore, the creditor relinquish the security, his recourse is lost, because he has cut off the cautioner's relief, and disabled himself from assigning the security. The same result follows, if, by the creditor's neglect, a security is not perfected, and loss thereby ensues. So, when the creditor holds an heritable security, to which the cautioner is entitled to look for his relief, the cautioner is freed, if the creditor neglects to complete the security; *Fleming v. Thomson*, 23d May 1826; *Storie v. Carnie*, 3d June 1830; which are both cases of

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securities with holdings *a me*, which failed in consequence of the creditor neglecting to obtain confirmation. The cautioner is not bound, if the conditions of the principal obligation are varied without his knowledge; *Taylor and Paterson v. Scoular*, 20th June 1816. Here the obligant agreed to be collaterally bound for £100 towards a composition of 10s. in the pound, but the composition having, without consulting him, been fixed at 10s. 6d., and the arrangement otherwise varied, he was held to be thereby liberated. In *Munro v. Cameron*, 18th May 1821, upon the failure of a tenant his cautioner became liable for the rent, but was held to be liberated by the granting of a new lease to another party without his privity. See also the case of *Walker v. Fraser*, 10th February 1837. Farther, if the creditor grant indulgence and delay without consent of the cautioner, the latter is freed; *Macartney v. Mackenzie*, 4th June 1830; reversed 23d September 1831. In this case the creditor, without the cautioner's privity, made affidavit of debt in a trust, whereby diligence was superseded for three years, and, although he did not subscribe the deed of accession, he was held in the Court of last resort to have approbated the trust and superseding of diligence, and so to have liberated the cautioner. But mere inactivity on the part of the creditor will not liberate the cautioner. The rule is thus stated by Lord ELDON:—"If a creditor, without the consent of the surety, give time to the principal debtor, by so doing he discharges the surety"—that is, if time be given by virtue of positive contract between the creditor and principal, not where the creditor is merely inactive." The rule, as thus stated, was applied in the case of *Macgart's Representatives v. Watson*, 24th January 1834, reversed 16th April 1835; and in *Creighton v. Rankin*, 6th February 1838; affirmed 26th May 1840; as also *Morison v. Balfour*, 16th February 1849. This benefit extends to the obligants in letters of guarantee, who have the privilege of suretyship, that, if the creditor grant delay to the debtor by taking bills or otherwise, the granter of the guarantee is freed; *Richardson v. Harvey*, 29th March 1853. The rule as to the giving of time is not applicable in its strictness to debts owing by both heirs of line and of provision; *Stuart v. Campbell*, 6th February 1852; where an heir of possession was found liable for the amount of a bond, notwithstanding a *supersedere* of payment granted by the creditor in consideration of a bond of corroboration by the heir of line. If the creditor be chargeable with misrepresentation or concealment from the cautioner, as in misrepresenting the amount for which the obligation is undertaken, the cautioner will be free; *Royal Bank v. Ranken*, 20th July 1844. This case shews the necessity of rigid accuracy as to the facts in the preparation of documents relating to such obligations.

From the nature of the bond of caution as an accessory obligation

Hume, 108.
LIBERATION OF CAUTIONER BY CONDUCT OF CREDITOR, *contd.*
1 S. 19.
15 S. 526.
8 Sh. 862.
5 Wil & Sh. App. 504.
12 S. 332.
1 Sh. & Macl. App. 553.
16 S. 447.
1 Rob. App. 99.
11 D. 653.
15 D. 628.
14 D. 443.
6 D. 1418.

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it necessarily follows, that, where the principal debtor can resist a claim, the cautioner also can resist it, there being no place for his liability, if the principal for whom he is bound be not liable. Every defence, therefore, which is competent to the principal debtor, is available also to the cautioner.

It is another inherent quality of the cautionary obligation, that the cautioner is not liable beyond the terms of his obligation. So, when one was bound, that a party should account for goods *to be* shipped, he could not be subjected for the price of goods shipped before the date of the obligation; *Napier and Co. v. Bruce*, 11th February 1840.

2 D. 556.

CAUTIONER'S
RIGHT OF
RELIEF.

If the cautioner is not freed by the creditor's conduct, then his remedy consists in his right of relief from the principal debtor in full, and from the other sureties, if there be any, to the extent of their shares of the loss. Against the principal debtor he has the *actio mandati*, (as having become bound at his desire,) either (1.) upon being distressed—that is, upon any legal step being taken against him by the creditor—when he may require him to get the obligation discharged; or, (2.) upon payment, which entitles him to demand payment from the principal debtor. Before distress or payment the cautioner may sue the principal for relief, if the debt remains unpaid after the term of payment, and even before the term of payment he may use precautionary diligence, if the principal debtor be *vergens ad inopiam*. In *Burnett v. Veitch*, 20th November 1685, decree of adjudication was allowed to go out in favour of a cautioner, although not distressed, but with the qualification that it should not take effect till distress. Where the cautioner has obtained an onerous assignation of the debt and security, he can use the creditor's rights of recovery by sale or otherwise, and it is not relevant to allege in bar of these rights, that he was a cautioner, and has not been distressed; *Gray v. Thomson*, 24th November 1847. The principal debtor is bound to relieve the cautioner, not only of the debt and interest, but also of the expenses of maintaining a reasonable defence. But as the obligation of relief is intended to subject the principal in payment of money advanced on his account, no relief is granted to a cautioner, for whose benefit the principal debt was incurred; and so, when the drafts upon a cash-account were employed in liquidating a previous debt for which the cautioner was bound, he was found not entitled upon paying up the account to be relieved by a principal obligant not liable for the previous debt; *Erskine v. Cormack*, 5th July 1842. The cautioner has no relief, if he pay a debt not due by the principal, for, upon being distressed, he should notify it to the principal, in order that his defences may be stated; *Maxwell v. Nithsdale*, 19th December 1632. Nor has he a claim of immediate relief, if he pay the debt before it is due; *Owen*

M. 2121.

10 D. 145.

4 D. 1478.

M. 2115.

12 S. 130.

v. *Bryson*, 26th December 1833. We have seen, that it is a test of the creditor's hold upon the cautioner, whether or not he remains capable of assigning his claim against the principal debtor, and the securities for it. As by our law the cautioner has the benefit of recourse *de jure* upon payment, although he may not receive an assignation, and, although there be no clause of relief, it was formerly held, as stated by Mr. Erskine upon the authorities cited by him, that the creditor might not be compelled to assign to the cautioner who paid. It is now well settled, however, and a point of the most familiar practice, that the creditor is bound to assign the debt, the grounds and securities of it, and also the diligence, to an obligant who makes payment; *Erskine v. Manderson*, 14th January 1780; *Lowe v. Greig*, M. 1386. 17th February 1825. A cautioner in a tack is entitled upon payment of the rent to receive an assignation of the landlord's right of hypothec; *Stewart v. Bell*, 31st May 1814; and the importance of his obtaining it is shewn by *Garden v. Gregory*, February 1735, where an arrester was preferred to a cautioner, who had paid the rent without getting an assignation of the hypothec, which was held to be extinguished by the payment. An exception to the obligation to assign is admitted in the case of a security held by the creditor for another debt, as well as for the debt paid by the cautioner. Here, equity will not compel him to transfer the security. But this doctrine is again subject to the qualification, that if the creditor make a second loan, posterior to that for payment of which a cautioner is bound, he cannot prejudice the cautioner's relief by applying a security held for both debts in payment of the second debt first, so as to cut off the cautioner's relief from the security; *Sligo v. Mensies*, 2 D. 1478. 18th July 1840. Here a cautioner was bound in an heritable security for a certain sum. The creditor made a subsequent loan to the debtor upon the same security, and the subjects having been sold, he proposed to apply the price in the first place in payment of the second obligation, so as to throw the burden of the prior debt upon the cautioner. But he was held bound to rank the debts in their natural order, and so give the cautioner the benefit of the security. The opinions of the whole Court were taken on this case, and the report is full of instruction, containing the elaborate opinions, distinguished by learning and legal subtlety, of Lord MACKENZIE in support of the judgment, and Lord MONCREIFF for the opposite view.

We have seen that co-cautioners have mutual claims of relief against each other. One cautioner, however, cannot sue another before he has made a payment himself, although he may sue the principal without having made any payment; *Alston v. Denniston & Co.* 2d December 1828. One of two solvent cautioners having paid and obtained an assignation is entitled to charge the other for his share, and for one-half of the shares of the insolvent cautioners, upon as-

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RIGHT OF
RELIEF, *contd.*
*Jus cedendarum
actionum.*

Inst. iii. 3, 68.

Ersk. Inst. iii.
5, 11.RELIEF OF CAU-
TIONERS *inter
se.*

7 S. 112.

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6 S. 264.

8 S. 295.

Ersk. Inst. iii.
3, 69.CAUTIONERS'
RELIEF *inter se*,
contd.

F. C.

M. 3393.

M. 2140.

2 S. 368.

8 S. 924.

signing to that extent the bond and securities; *Finlayson v. Smith*, 20th December 1827. A cautioner is liable to the same objections as the original creditor, and so loses his recourse against a co-cautioner by giving time and relinquishing securities; *Hume v. Youngson*, 12th January 1830. When a new cautioner becomes bound for a debt, it was formerly held that all the original obligants, whether principal or cautioners, were principals *quoad* him, and, therefore, bound to him in total relief; but it is now settled that a new cautioner can only claim total relief from the original cautioners, provided he became bound at their request and on their account; *Lennox v. Campbell*, 18th May 1815. Co-cautioners are subject to the same rule as the creditor, viz. that they must communicate to the other cautioners a proportional share of any security or relief which they may have obtained from the debtor. This rule originates in the principle, that the cautioners are all equally interested and entitled to have the obligation paid out of the debtor's means, and that no one cautioner, therefore, can weaken the common security by appropriating the debtor's property to his own separate relief. A cautioner who gets a security from the debtor, therefore, although it be expressly for his own relief only, is held to act as *negotiorum gestor* for the whole obligants, and is bound to communicate to his co-obligants a rateable share of the relief thus obtained. Where a debt was compounded, a cautioner was found entitled to recover from the other cautioners their proportions only of the compounded sum, thus giving them the benefit of the abatement; *Brodie v. Keith*, 27th July 1672; and in *Milligan v. Glen*, 20th May 1802, one of two cautioners, having obtained an heritable security in relief of the obligation, was held bound to communicate the benefit of it to the other cautioner. An exception to this doctrine was made in the case of *Laurie v. Stewart*, 6th June 1823. Cautioners bound in the same deed, but for separate and different sums, were here held not to be *correi*—that is, bound in the same obligation; and such of them as had obtained securities and relief were found not liable to communicate these to a cautioner for a different amount, who had been forced to pay. This decision was pronounced by a bare majority of Judges, and it has been regarded as at variance with the principle of cautionary obligations. But the careful Conveyancer will be warned by it not to leave room for doubt, when it is intended that there should be a proportionate relief amongst all the cautioners, by binding them expressly to communicate to each other whatever security or relief any one of them may obtain. The obligation to communicate securities does not extend to the case of a security or relief obtained from a stranger, for the principal debtor's estate, which is the common source of relief, is not thereby diminished. The cautioner, therefore, to whom a security is given by a third party, may retain it entirely to himself; *Coventry v. Hutchison*,

16th June 1830. It is of importance in practice to attend to the rules by which claims are regulated upon the bankruptcy of a co-obligant. Although liable to the creditor *in solidum, correi* are obligants *pro ratâ* only in relation to each other. When one of two joint obligants, therefore, pays the whole debt, he is entitled to be ranked on the estate of a bankrupt co-obligant for half the amount only; *Maxwell's Creditors v. Heron's Trustees*, 8th February 1792; and see M. 2136. also *M'Ghie's Creditors v. Tait*, 18th November 1785; *Craigie v. M.* 14668. *Graham*, 21st December 1710; and *Bell's Commentaries*, i. 354. M. 14649. Again, the claim of relief arises only upon such part of the debt paid by one obligant as exceeds his share. Although, therefore, the estate of an insolvent cautioner has the whole debt ranked upon it, that estate has no further relief against the solvent cautioners than in so far as the dividend paid has exceeded the share which the bankrupt would have paid if solvent; *Cranstoun v. M'Dowal*, 22d M. 2552. May 1798.

The facility with which parties interpose their credit for the accommodation of friends, not realizing the ulterior consequences to themselves, and the miseries thus resulting from cautionary obligations, did not fail to attract the attention of the Legislature. We have seen the efforts made in the Roman Law to alleviate the hardships of sureties by introducing first the benefit of division, and afterwards that of discussion, and that the Law of Scotland has adopted both of these principles. An additional protection to sureties was introduced by the Act 1695, cap. 5, in order to limit the duration of their liability. This statute provides, that no man binding and engaging for and with another, conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sums for longer than seven years after the date of the bond; but that from and after the said seven years the said cautioner shall be *eo ipso* free of his caution. The Act then defines who are the cautioners entitled to the benefit of the enactment; and these are parties bound for another, either as express cautioners, or as principal or co-principal, provided there be either a clause of relief in the bond, or a bond of relief apart, intimated personally to the creditor at his receiving the bond. But it is declared, that all legal diligence done within the seven years shall be effectual afterwards. This prescription of cautionary obligations is not, it will be observed, like other short prescriptions, restricted in its effect so as to preserve the debt, provided it can be established by a certain limited kind of evidence. On the contrary, it operates as an immediate and total extinction of the obligation. But it is available only to one, who is bound conjunctly and severally with the principal debtor, and who is either described as a cautioner in the bond, or has right to relief by a clause in the bond, or by a separate bond of relief intimated to the creditor when the principal bond is

PRESCRIPTION
OF CAUTIONARY
OBLIGATIONS.

1696, c. 5.

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- 6 S. 137. **PRESCRIPTION OF CAUTIONARY, cont'd.** delivered to him. When the cautioner is bound expressly as cautioner, he receives the benefit of the Act, although there be no clause of relief, or any separate bond of relief intimated; *Yuille v. Scott*, 27th November 1827. In this case, the party was bound as "cautioner, "surety, and full debtor;" and being thus expressly bound as cautioner, although liable also as principal, he was found to have the benefit of the prescription without a clause or bond of relief. See also *Monteith v. Pattison*, 3d December 1841. This being a statutory remedy, and the nullity being created by statute, it cannot be renounced; and, even if a cautioner pays interest, or otherwise recognises his obligation after the lapse of seven years, he is presumed to act in error, there being no room to apply homologation to an obligation extinguished by statute. A cautioner, therefore, having paid, and next day having discovered that by the expiration of seven years he had been freed, was found entitled to repetition; *Carrick v. Carse*, 5th August 1778. The same was decided in the second stage of the case of *Yuille v. Scott*, 9th February 1830; affirmed on appeal, 15th September 1831. When the co-obligant is not bound expressly as a cautioner, but has a separate bond of relief, that bond will not be available to him unless it be intimated, as required by the Act, to the creditor at the time he receives the principal obligation. And so strictly is this enforced that, although the creditor has a private knowledge of the bond of relief, that circumstance will not avail, if there be not actual intimation in compliance with the statute; *Bell v. Herdman*, 14th February 1727. It was admitted as an equipollent to intimation, that the creditor himself wrote both the principal bond and the bond of relief, in *M'Ranken v. Schaw*, 24th February 1714. But the authority of this decision was strongly impugned by the Judges in *Drysdale v. Johnstone*, 25th January 1839, in which it was decided, that a bond of relief could not be held to be intimated, though written by the same person who acted as agent for the creditor in writing the principal bond.
- M. 2931. **INTIMATION OF BOND OF RELIEF.** It was decided in various old cases, that the Act has no reference to the bonds of parties who are all equally liable. Nor does it apply in the case of a bond of corroboration, in which the cautioner is not bound conjunctly and severally with and for the principal debtor; *Caves v. Spence*, 4th December 1742. The report of this case by Lord KAMES contains an exposition by his Lordship of the design and import of the Act. A collateral obligation, guaranteeing payment of money lent upon a bond and disposition in security, is not a cautionary obligation, and the granter of it has not the benefit of the Act; *Tait v. Wilson*, 8th December 1836; affirmed on appeal, 21st July 1840. Judicial cautioners, and cautioners for the faithful discharge of an office, are not entitled to the benefit of this Act, which relates to obligations for liquid sums; *Strang v. Fleet*, 5th January
- 8 S. 485.
5 Wil. & Sh.
App. 426.
- M. 11039.
- M. 11084.
- 1 D. 409.
- EXCEPTIONS FROM THE ACT, 1696, c. 5.**
- M. 11020.
- 15 S. 221.
1 Rob. App. 137.
- M. 11005.

1707; *Hogg v. Low*, 10th June 1826; *Gallie v. Ross*, 4th March 1836; *Kerr v. Bremner*, 5th March 1839. And, as it relates only to money obligations, it affords no benefit to the cautioner in an obligation *ad factum præstandum*; *Stewart v. Campbell*, July 1726. Nor is it available to the cautioner in a bond executed in a foreign country, though sued upon in this, the Act being held to affect the quality of the contract *ab initio*, in the same way as if the bond bore a consent to be bound only for seven years. For such a presumption there is no room in a foreign deed; and, therefore, the statute is not applicable to a contract made out of Scotland; *Alexander v. Badenach*, 23d December 1843. And the septennial limitation does not cut off the claim of relief at the instance of one cautioner against another, but that claim endures for forty years; *Forbes v. Dunbar*, February 1776. The Act 1695, cap. 5, attained its benevolent object in only a very limited degree; for, while it pointed out in what way the benefit of the septennial limitation might be secured, it necessarily indicated at the same time how it might be excluded; and practitioners, in order to avoid the operation of the Act, required all the obligants to be bound as principals, without any distinction implying that one was more liable than another. Our bonds for borrowed money are still, accordingly, so conceived as to make all the parties principals, and bound conjunctly and severally, even the words "full debtor," though they import a full obligation, being avoided, because they convey a distinction at the same time. Nor will the creditor take a bond bearing a clause of relief, because that implies that the cautioner's liability is limited to seven years. The separate bond of relief was thus the only resource available to a co-obligant; who, though in reality and in relation to the debtor benefited he is a cautioner merely, yet becomes bound as principal. But the object of his interposing on behalf of the party who wants the money would be defeated by intimating the bond of relief at the time the principal bond is delivered, for the creditor would thus be apprised that he is eventually to lose the security of the intimating obligant, and this, therefore, would be the signal for calling up the loan. Although, therefore, a bond of relief be taken, it is not generally intimated; and thus, in the great majority of cases, the intention of the statute is defeated, the co-obligants being, as Mr. Ross has observed, in a worse position than before; because before the statute they appeared expressly as cautioners, which gave them a claim to the privilege of discussion, while now they are deprived of this, because the creditor will not allow them to be described as cautioners in the bond.

From all that has been said the following rules in Conveyancing are deducible, viz—

(1.) When two or more parties are bound simply without any addi-

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4 S. 702.
14 S. 647.
1 D. 618.
M. 11010.

6 D. 322.

M. 11014.

RULES FOR
FRAMING BONDS
OF CAUTION.

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RULES FOR
FRAMING BONDS
OF CAUTION.

tion qualifying the obligation—as, for instance, “*We, A. B. & C., bind and oblige ourselves and our heirs,*” &c.—they have the benefit of division, and each is liable only for his own share.

(2.) The effect of the obligation is the same, when they are bound “*conjunctly.*”

(3.) If the obligation be, “*We, A. B. & C., bind and oblige ourselves conjunctly and severally,*” the obligation is *in solidum*, and each obligant is liable for the full amount.

(4.) The same result follows when a party is bound as “*co-principal,*” or as “*full debtor,*” with another.

(5.) When a party is bound as cautioner for another, he is entitled to the *beneficium ordinis*, and may require the creditor to discuss the principal debtor, before making any demand upon him.

(6.) When one is bound as cautioner for another, he has a claim of relief against the principal debtor and his property; and, if any part of that property be impledged as a security for this debt, such security, whether granted to the creditor or to a co-cautioner, is a security and relief to every cautioner as well as to the holder of it, and neither the principal debtor's obligation, nor a security granted by him, can be discharged or relinquished without thereby relieving the cautioner. This is the cautioner's *jus cedendarum actionum*, by which he is entitled also upon payment to receive an assignation of the principal debtor's obligation and of every security affecting his property.

(7.) One who is bound conjunctly and severally with another for a sum of money is discharged by the expiration of seven years from the date of the obligation, provided that he is either bound expressly as cautioner, or that the bond contains a clause of relief in his favour, or that he has a separate bond of relief, intimated to the creditor at the time of delivering the principal bond.

(8.) The *beneficium divisionis*, and *beneficium ordinis*, may be renounced. The benefit of the septennial limitation cannot be renounced.

These are the rules for the Conveyancer's guidance in preparing bonds and obligations by more than one obligant. They are fully illustrated in the reports of decisions which have been referred to, and copious examples of the forms in which they receive effect will be found in the Juridical Society's Styles. It is unnecessary to examine these in detail, but one or two remarks may be useful in testing the principles.

At page 55 of the Styles, (vol. ii., 3d edition,) there is the form of a bond with a cautioner, who is bound simply as such, and the respective liabilities of the parties are thus ascertained:—“*I, the said A. as principal, and I, C. as cautioner for the said A., but that subsidiary, and after discussion of the said A., and as proper cautioner only, bind and oblige ourselves, our heirs,*” &c. This style is anxi-

ously minute, and there is no portion of it after the word "*cautioner*" necessary for the cautioner's security. His being described as cautioner fixes with certainty, that he is liable only *subsidiarie*, and that he is entitled to require discussion, although these effects, resulting from the nature of the obligation, were not expressed. The same remark may be made in regard to the introduction of a clause of relief, which is here directed, the word "*cautioner*" fixing his claim of relief as certainly without the clause as with it. Here, therefore, these three things, viz. the subsidiary liability, the *beneficium ordinis*, and the right of relief, are all contained in the word "*cautioner*," and would result as inevitably by the force of that word alone, as they can do by the most anxious description of these rights. We have seen, too, that the description of "*cautioner*" secures the benefit of prescription, so that the clause of relief is unnecessary as regards that point also. But this form is open to the remark, that the parties are not *per expressum* bound conjunctly and severally. Their liability, no doubt, is the same without these words, for the term "*cautioner*" implies an obligation to pay all that the principal fails to pay; but it would be prudent, in order to exclude all possibility of question, to make the cautioner's obligation accord *in terminis* with the statute, by binding him conjunctly and severally with the principal debtor.

I do not advise, that those portions of this form which are unnecessary should in every case be discarded. That is a matter in the practitioner's discretion; and it may often be advisable to make deeds explain their own effects both for the satisfaction of the parties, and also that they may be made clearly aware—the granter, of the liabilities which he is undertaking—the receiver, of the security which he obtains. It is a good general rule, however, to be satisfied with terms, which certainly produce the desired effect. The adage "*superflua non nocent*" is dangerous, when admitted to swell the language of documents so liable to be thoroughly sifted as legal instruments. If one could be absolutely certain that what he says is indeed superfluous, then there were no harm; but what is superfluous is unnecessary, and what one Conveyancer regards as superfluous, another may discover to be restrictive; and so what was added for the sake of strength may in reality weaken or prevent, in a greater or less degree, the effect which the proper legal term, by its own unaided force, would have produced.

At page 56 of the Styles there is a form, entitled "Bond of caution for the regular payment of interest." This is not, strictly speaking, however, a bond of caution. It narrates the principal bond, no doubt, but the granter is bound absolutely for the payment of the interest, and has none of the privileges of a cautioner in relation to the creditor. He cannot claim the benefits of division or of discussion, or the septennial prescription, and his only security is his relief against the

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OF CAUTION,
*contd.*1 Rob. App.
150.

principal debtor, which is provided for by stipulating assignments upon payment. This bond, therefore, is to be regarded not as an undertaking that another shall pay, (which is the proper meaning of caution,) but as a direct contract to pay, and so falls within the distinction drawn by Lord Chancellor COTTENHAM in the appeal, *Wilson v. Tait*, already referred to.

The form of "Bond with cautioner by a factor" at page 62 of the Styles gives an example of an obligation framed so as distinctly to define the cautioner's liabilities and rights:—"I, A. as principal, and I, C. as cautioner and surety for and with the said A., bind and oblige ourselves conjunctly and severally, our heirs, executors, and successors, that I the said A. shall hold just compt and reckoning," &c. Here, in terms of the Act, the cautioner is bound "*conjunctly and severally*" "*for and with*" the principal; his obligation is, that the principal shall perform, and the privilege of discussion is properly left dependent upon the character of cautioner.

SOLEMNITIES OF
CAUTIONARY
OBLIGATIONS.

M. 17056.

p. 912.

Strict observance of the solemnities is indispensable in cautionary obligations. Writing is essential to their constitution; and wherever writing is essential, it must be executed in legal form; *Wallace v. Wallace*, 25th November 1782. In Hailes' decisions will be found the remarks of the Judges. It was the case of an improbativ obligation, of which the granter admitted the subscription; but Lord BRAXFIELD observed, that, wherever writing is necessary, no acknowledgment of subscription will serve to supply legal imperfections in the deed.

CASH-CREDIT
BOND.

Bond for cash credit.—The mode of business conducted under the security of this important instrument, Lord BROUGHAM remarks, may almost be said to have become classical, from the description and commendation of it given by Mr. Hume. The passage referred to occurs in the Essay on the Balance of Trade. After characterizing the invention as "one of the most ingenious ideas that has been executed in commerce," Mr. Hume describes the bank credit thus:—"A man goes to the bank, and finds surety to the amount, we shall suppose, of a thousand pounds. This money, or any part of it, he has the liberty of drawing out whenever he pleases, and he pays only the ordinary interest for it while it is in his hands. He may, when he pleases, repay any sum so small as twenty pounds, and the interest is discounted from the very day of the repayment. The advantages resulting from this contrivance are manifold. As a man may find surety nearly to the amount of his substance, and his bank credit is equivalent to ready money, a merchant does here in a manner coin his houses, his household furniture, the goods in his warehouse, the foreign debts due to him, his ships at sea; and can, upon occasion, employ them in all payments, as if they were the current money of the country. If a man borrow a

"thousand pounds from a private hand, besides that it is not always to be found when required, he pays interest for it whether he be using it or not. His bank credit costs him nothing, except during the very moment when it is of service to him. And this circumstance is of equal advantage as if he had borrowed money at much lower interest."

PART II.
CHAPTER I.

The bond for the cash credit proceeds upon the narrative that the particular bank contracted with has agreed to allow the obligants credit upon a current account, to be kept in the bank books in name of the particular obligant who is to operate upon the account, to the amount of a sum specified. And the whole obligants bind and oblige themselves conjunctly and severally, and their heirs, &c. to pay to the bank the sum so specified, or such part or parts thereof as the obligant in whose name the account is to stand shall obtain value for, or draw out by orders on the bank or their cashier, and such sums as the bank shall stand engaged for on his account by accepted or discounted bills, letters of credit, guarantees, &c. not exceeding in all the sum specified, over and above the money lodged by the obligant. The term of payment is upon demand after six months, or other time agreed upon, from the date, with interest and penalty. And then there is inserted a clause peculiar to obligations in which the amount depends upon after-transactions, and will vary from time to time. This is a declaration, that a stated account made out from the party's drafts and from the bank books, and signed by the bank's accountant with reference to the bond, shall be sufficient to constitute and ascertain a charge against all the obligants, who engage not to suspend the charge so ascertained, but upon consignment only.

FORM OF CASH-
CREDIT BOND.

By the terms of this deed, it will be observed that the whole obligants are bound as principals, the expression of the real character of any of them as sureties being avoided, by stipulating for a credit to the whole upon an account in the name of one. They are thus excluded from the benefits of division and discussion. Still, the real nature of the transaction is unavoidably disclosed by the narrative, which shews that the credit is for behoof of one only; and, although the co-obligants who do not operate upon the account are debarred by the terms of the bond from the benefits proper to cautioners expressed, yet they are entitled to the equitable rights belonging to their position as being in reality sureties, although waiving certain privileges by the terms of the obligation. Thus they have the benefit of the presumption that the money has not been advanced to themselves or on their account; and as, when a certain number of sureties contract with a creditor, it is an implied condition of the obligation of each, that the rest shall be bound along with him, so it results, that, if any of the co-obligants in the bond for a bank credit do not subscribe, the rest are not bound. This point was carefully investigated and decided, according to the principle now stated,

EQUITABLE
RIGHTS OF
SURETIES IN
CASH-CREDIT
BOND.

PART II.

CHAPTER I.

6 D. 987.

F. C.

RIGHTS OF
SURETIES IN
CASH-CREDIT
BONDS, *contd.*

in the case of *Paterson v. Bonar*, 9th March 1844. The authority relied upon in that case to fix a liability upon the subscribing obligants, although one party, stated in the body of the deed as an obligant, had not subscribed, was the case of *Macdonald v. Stewart*, 5th July 1810, in which it was decided that a bond for borrowed money, bearing to be granted by five parties, bound conjunctly and severally, but subscribed only by four, was effectual against the subscribers, because it was their interest and duty to take care that the deed should not be delivered until subscribed by the fifth party named. If this had been the case of an advance to the four co-obligants themselves or for their behoof, the justice of this decision would have been undoubted, as the four subscribers would have been principal parties not only in form but in reality. It cannot be doubted, that the obligant who receives the money is bound, although the deed be not subscribed by others. But, in the case of *Macdonald*, the co-obligants, though bound as principals, had been in reality proposed to and accepted by the creditor as securities, and the effect of the decision, therefore, was to make three parties liable for an obligation which they had only undertaken to grant in conjunction with a fourth. Upon these grounds the authority of this decision is now to be regarded as very doubtful; and it was expressly stated, by several of the Judges in the case of *Paterson*, that they could not have concurred in it. It has been stated to be a rule with banks, not to take a bond of caution signed by a company firm as sureties, because such an obligation is not in the line of a mercantile company's business, and the subscription, therefore, would not bind the company or the partners who did not adhibit or authorize it. And, therefore, in the case of *Christie v. Reid*, 19th January 1826, a bond having been subscribed by a mercantile company and the two partners of it, along with another party and the principal obligant, it was held that the subscriptions of the partners, although not described as partners in the bond, had been added merely to make the subscription of the company effectual, and that the company's signature and the signatures of the partners were to be reckoned as the obligation of one cautioner only. In such circumstances, therefore, if the partners of a company are to be bound individually as separate cautioners, that should be explicitly stated. The case of *Christie* it is instructive to compare with *Melliss v. The Royal Bank*, 22d June 1815, where the cash credit being in favour of a company, who were the principal obligants, the subscription of each partner subjoined to that of the company was held to bind him not only as a partner but as an individual, without express words to that effect. But the terms of the bond should be explicit, so as to exclude doubt in either case.

F. C.

EFFECT OF CASH
CREDIT BOND.

6 D. 822.

With regard to the effect of the cash credit bond, an opinion was stated from the Bench in the case of *Alexander v. Badenach*, 23d December 1843, already referred to, that parties bound expressly as

cautioners in such an instrument would not have the benefit of the septennial prescription. This is probably on the principle that the Act refers to sums of liquid amount, and not to an instrument contemplating a long series of transactions with a fluctuating balance. The bond remains effectual after the co-obligant's death, and it continues a current engagement against his heirs, who are liable for drafts after his death; *University of Glasgow v. Miller*, 18th November 1790; *Paterson v. Calder*, 5th July 1808; *Dudgeon v. Laing*, 1st December 1813. The propriety of the decisions in the *University of Glasgow* and *Paterson* has recently been seriously impugned by the Second Division of the Court in *Wyllie v. Fiddes*, 13th December 1853. In that case the eldest son, who had taken up the heritable estate, and also confirmed executor to his father, was held to be his father's representative, and a younger son, who had received his share of the moveable estate, was found not liable to make good to the bank an obligation by the father for a cash credit account in favour of the eldest son. In Lord Wood's opinion will be found an excellent exposition of the cases of *Poole v. Anderson*, 22d February 1834, and of *Robertson v. Strachan*, 29th July 1760, which shew in what circumstances a child (who is not his father's executor) may be held liable for the father's debt, and when not. Although the stated account certified by the bank's accountant is admitted in practice as sufficient to ascertain the balance due, and to authorize a charge for the amount, the stipulation that such a charge shall not be suspended without consigning the amount, is not binding, being held to infer an interference with the principles of public law, which will not countenance an obligation implying the surrender by a party of the right to have his case tried by the Courts of Justice. This was settled in *Forrester v. Walker*, 27th June 1815, the opinion of Lord MEADOW-BANK in which case is well deserving of perusal, as it contains a striking exposition of the principles upon which the distinction depends between a renunciation of what is merely a private benefit—as the rights of division or discussion—and what is a public or legislative regulation—as the right of trial or the statutory prescription. It is not necessary that the bond contain a consent to register the stated account, or that the stated account be registered, in order to warrant execution. This has been solemnly decided in the case of a bond of caution for a bank agent, where a similar provision is inserted, and the same principle necessarily extends to the cash credit bond; *Fisher & Hepburn v. Syme*, 2d December 1828. Here the report contains the opinions of the whole Judges. Although the stated account, by virtue of the obligant's consent, is received as ascertaining the balance, that circumstance does not preclude the obligant from questioning the balance, if he undertake to shew that it is erroneous; *Smith v. Drummond*, 25th June 1829. The bank may not include, in the

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CHAPTER I.
EFFECT OF
CASH-CREDIT
BONDS, CONTD.

M. 2106.
M. voce "Society," Appx.
No. 4.
Hume, p. 102.

16 D. 180.

12 S. 481.

M. 8087.

STATED ACCOUNT.

F. C.

7 S. 97.

7 S. 792.

- PART II.**
CHAPTER I.
9 S. 488. stated account against a bank agent and his cautioners, law expenses incurred after the close of the agency; *Paisley Union Bank v. Hamilton, &c.* 24th February 1831. The balance which may arise is usually made payable to the cashier or other officer of the bank, and, when such officer is named, diligence at his instance is competent; 6 S. 216. *Fisher & Hepburn v. Syme*, 7th December 1827. Upon the same principle, diligence is competent upon an obligation regulating the debt by an account to be kept by the debtor; and, in *Baird & Co. v. Neilson*, 21st March 1842, a party being bound by agreement to render an account, to exhibit books in support of it, and to pay according to the account, it was held competent to charge him by horning to perform these several acts. Where there is a bond for a cash credit, it is competent to accumulate interest annually, and to charge for the balance thus ascertained; *Cruickshank v. The British Linen Company*, 26th November 1834.
- BONDS FOR DISCHARGE OF AN OFFICE.**
Bond for the due discharge of an office.—We have already adverted to the bond of caution for a factor, and precedents will be found in the Juridical Styles for the bond by a bank's agent, by the cashier or teller of a bank, by a judicial factor, a *curator bonis*, a *factor loco tutoris*, the *interim* factor and trustee on a sequestrated estate, tutors and others, along with cautioners, and also of bonds of caution in the confirmation of executors and in suspensions. The observations already made with regard to the charge founded upon a stated account, apply also to the bond for bank agents, and to all other bonds, in which a consent to that effect is inserted.
- LIBERATION OF CAUTIONER BY NEGLIGENCE TO CONTROL OFFICIALS.**
There is a series of very important decisions regarding cautionary obligations for the due discharge of such offices as fall to be exercised under inspection, or according to specified regulations. In such cases, as the cautioner in granting his obligation relies upon the checks and control provided by the constitution of the office, it has been repeatedly held, that he is liberated by gross negligence on the part of the principal in exercising control, and applying the checks; *Leith Banking Company v. Bell*, 12th May 1830, affirmed, 1st October 1831. Here the cautioners for a bank agent were liberated, the bank having permitted the agent to carry on an illegal trade, violate his instructions, incur unusual hazard and loss, and to become deeply involved, without apprising the cautioners. In *Thistle Friendly Society v. Garden*, 17th June 1834, the treasurer of the society having been allowed to deposit the funds in his own name, contrary to the society's rules, and the society having neglected to audit his accounts, the cautioners were assolized, on the ground that the society had not taken ordinary or reasonable care to overlook or check his proceedings. In *Duncan v. Porterfield*, 13th December 1826, the cautioners for the trustee on a bankrupt sequestrated estate were held to be relieved by the negligence of the commissioners and creditors, who allowed him to
- 8 S. 721.
5 Wil. & Sh. App. 708.
12 S. 746.
5 S. 111.

embezzle the trust funds, and took no account of his proceedings for a period of years. In *Forbes v. Welsh*, 10th June 1829, the defender became bound for a factor under this stipulation :—" I make a point " of it, that mutual discharges for bygones shall take place at least " once every year." No such annual settlement having ever taken place, the cautioner was held to be free. In *Pringle v. Tate*, 17th November 1832, there will be found the case of a cautioner being allowed to suspend a charge without caution, in consequence of the accounts of the judicial factor for whom he was bound having been allowed to remain for several years unexamined, and at last audited without notice to the cautioner. The effect here was merely to allow the cautioner to try his objections to the charge without finding security, but the case shews the importance of exactness and attention where cautioners are concerned. And, in *Bonar v. Macdonald*, 17th July 1847, affirmed, 9th August 1850, the cautioners for a bank agent were freed by an alteration of arrangements, whereby his responsibility was increased, without notice having been made to them. It has been attempted to obviate this class of objections by a consent or renunciation on the part of the cautioners, and at page 68 of the *Juridical Styles*, vol. ii. (3d edition,) there is the form of a bond by a bank agent, in which a declaration is inserted, that it shall not be competent for the cautioners to plead that the bank or its officers have not been sufficiently vigilant in superintending the agent, and that the bank shall not be bound to superintend him on account of the cautioners, or to give them any notice of his proceedings, or of any circumstance likely to render necessary the enforcement of their cautionary obligation. By the same form, the agent and cautioners are made responsible for all loss, not only by clerks and servants, but by fire, robbery, theft, embezzlement, or any other accident or misfortune. It is doubtful, however, how far the Courts would recognise stipulations so adverse to the principles of equity.

The obligation for the cautioner of a bank agent is terminable at the discretion of the cautioner, who may at any time insist against the agent to have his bond given up or cancelled, or the amount of it impressed in his hands to be applied towards extinction of any balance; *Taylor & Wright v. Adie*, 3d July 1818. The same was found in the case of a collector of taxes, in *Kinloch v. Mackintosh*, 13th June 1822.

Upon the principle which has been noticed, viz. that a cautioner is freed, if any alteration be made upon the substance or tenor of the obligation without his consent, it follows, that the obligation of a cautioner cannot be cancelled or discharged, or a new cautioner substituted in his place, without the express concurrence of all the other obligants. This is a point of frequent occurrence in practice, and it requires very careful attention. Take the familiar instance of the

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CHAPTER I.
RELEASE OF
CAUTIONER BY
CONDUCT OF
CREDITOR, *contd.*
7 S. 732.
11 S. 47.

9 D. 1537.
7 Bell's App.
379.

SUBSTITUTION
OF NEW CAU-
TIONER.

PART II.
 CHAPTER I.
 SUBSTITUTION
 OF NEW CAU-
 TIONER, *CONTD.*

cautioner in a bond for a bank agent desiring to be liberated, and an arrangement being made to have another party substituted in his room. What is necessary here? *First*, The new surety must be bound to the same effect as the one released; *secondly*, the retiring cautioner must be discharged; and *thirdly*, all the other cautioners must consent both to the discharge of the retiring cautioner, and also to be bound along with the new cautioner, to the same effect, and with the same mutual liabilities, as with his predecessor. This is a complicated operation, but no part of it can be omitted. In practice, it is most conveniently accomplished by a deed, in which is narrated the bond, and that it has been agreed by the bank or other creditor to release E. and to accept the obligation of F., as coming in his place—that the other obligants have assented to the substitution, and agreed to be bound along with F. in the same terms and to the same effect as they were originally bound along with E.—that by the execution and acceptance of this new deed E. is discharged of all claim by the creditor, as well as by his co-obligants. The Conveyancer will then bind and oblige the whole parties, substituting F. for E., in the same terms as in the original bond. In this way there is concentrated in one writing the acts of the different parties requisite to make effectual the new arrangement, and there is avoided the necessity of multiplied explanations and narrations, and the risk of imperfect reference or of omission incident to the embodying of one arrangement in various writings. This new deed will, of course, contain a clause of registration for summary execution against the whole obligants, including the new cautioner.

GUARANTEE AS-
 SOCIATIONS.

Guarantee Associations.—The intelligence and enterprise of this age have devised a scheme, whereby not only are the evils avoided, which result from a large class of cautionary obligations, but such obligations on the contrary are rendered a source of profit. This has been accomplished by the principle, now so widely developed in life assurance, banking, and other departments of business, *viz.*, the combination of the resources of many persons, who undertake a common responsibility, so that, when loss occurs, it is not felt, being diffused over a wide surface; and the premium charged for the responsibility being estimated at a rate somewhat exceeding the average probability of loss, the surplus of premiums, remaining after deduction of the loss, constitutes profit. As the duration of human life, though uncertain in the individual case, is ascertained with singular accuracy in the aggregate, so the average expectation of life at every period of it forms a secure basis, upon which may be calculated with certainty the price, by a present single payment, or by annual payments during life, of a sum of money, payable at death when it shall occur; and the losses occasioned by the deaths which happen before the period of expectation are com-

pensated by those which survive it. Fire insurance in the same way distributes among a large body of insurers the loss which may happen to one, and which is paid by anticipation in the annual premium. Upon a similar principle, the guarantee associations have been formed. Their business is to grant bonds for the due performance of offices. They do not yet possess the same accurate information in relation to the risks of this business, which enables the life assurance companies to adjust their charges with such remarkable accuracy and security, nor is it likely that a hazard dependent upon moral contingencies can ever be brought within a calculation so nearly approaching to certainty. But with an advancing experience they are studying to accomplish this object, viz., to make all the parties insured with them bear in common the loss resulting from the failure or misconduct of any one of them. This is accomplished by a bond of guarantee, granted by the association to the employer of the party, after they have satisfied themselves by inquiry in regard to the character and qualifications of that party. For this guarantee the party, on whose behalf it is given, pays an annual premium, and the safety of his employer is secured by a paid capital stock, contributed by the partners of the association. The advantages of these institutions are obvious. They are a complete antidote to the miseries entailed upon individuals and families by the forfeiture of bonds of caution. A young man of good character and attainments is enabled, by a small annual payment, to hold an office of trust, from which he might otherwise be excluded by the want of wealthy friends. The discomfort and hazard of subjecting friends to heavy liabilities are avoided, and any one, who wishes to serve a youth entering upon life, may still do so at the small expense of the annual guarantee, instead of the risk of large eventual loss. Upon these grounds the guarantee associations are worthy the attention of professional men.

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CHAPTER I.
GUARANTEE ASSOCIATIONS,
CONT'D.

Bond of Relief.—A cautioner, as we have seen, has a right of recourse against the principal debtor, which arises *de jure* upon payment or distress. That right will arise at common law, wherever it is made to appear that he is truly a cautioner, although bound as a principal. It arises also from the terms of the bond, when he is bound as cautioner, or when it contains a clause of relief. In these cases, however, although the right exists, it can only be made available by ordinary action, there being no warrant for summary diligence at the instance of the cautioner for making effectual his right of relief. A clause to that effect might, no doubt, be introduced into the bond; only the bond passes into the hands of the creditor, and the cautioner may be unable to obtain possession of it, when needed. The way to secure direct access for enforcing relief of a cautionary

BOND OF RELIEF.

PART II.
CHAPTER I.
BOND OF RELIEF, *contd.*

obligation by summary diligence is for the cautioner to take from the debtor a bond of relief. In the Juridical Styles there are examples of the bond of relief, in the various cases of the cautioner being bound as a co-principal, or expressly as a cautioner, or in a bond of credit, or in a confirmation, or for a bond of annuity. When the party is bound as co-principal, the bond of relief, which is, of course, in the name of the true debtor, narrates, first, the original bond—then, that the sum contained in it was entirely received and used by the true debtor—and that A. and B. (the grantees of the bond of relief,) had become bound at his desire, and on his agreement to relieve them. Then comes the obligatory clause :—“ *Therefore I bind and oblige myself, my heirs, executors, and successors, to warrant, free, relieve, harmless and skaitless keep, the said A. and B., their heirs, &c., of and from payment of the sums of money, principal, interest, and penalty, contained in the bond above recited, and of the said bond itself, whole clauses tenor and contents thereof, and of all cost, damage, and expense that they shall sustain therein, or be put to thereby, in any manner of way.*” Hitherto, it will be observed, that the obligation is no more than the clause of relief. But now comes the operative part, viz. :—“ *And, for that effect, either to make payment of the debt to the creditor, and to produce and deliver to the cautioners the bond with a sufficient discharge, that they may cancel their subscriptions ; or otherwise to make payment to the said A. and B., at the said term,*” (that is, at the term of payment of the original bond,) “ *of the foresaid principal sum with interest and penalty, together with such other expenses as the said A. and B. may have sustained in consequence of being bound, so that they may themselves make payment to the creditor, and thereby operate their relief.*” Then there is an obligation to implement the bond of relief under a penalty, which will secure indemnification of expenses incurred in enforcing it ; and, lastly, there is the consent to registration for summary execution at the instance of the cautioners against the debtor—in which consists the chief importance and value of this deed. It is unnecessary to examine the other forms, which differ only in so far as accommodated to their respective purposes. We have already observed, that the bond of relief does not confer upon the holder of it the character and privileges of cautioner as against the creditor, unless it be intimated to him at the time of delivering the bond.

CONSTRUCTION
OF BOND OF
RELIEF.

M. 4155.

M. 4164.

The bond of relief is favourably construed, and has been sustained notwithstanding errors in reciting the primary debt. Thus, in *Hamilton and Baird v. Hunter*, 5th July 1743, the ground of debt was narrated as granted in 1738 instead of in 1728, but the debt being otherwise identified the bond was sustained ; and in *Drummond's Daughters v. His Creditors*, 17th February 1795, the bond bore to be

in relief of one bond for £400, whereas the debt truly consisted of two bonds for £200 each. Greater difficulty was felt here on account of the relief being heritably secured, but the Court adopted the view, that, as the object of the security was not the debt itself but the relief to the cautioner, and, as the debt was verified, and the true amount and name of the creditor appeared on the record, want of precision in describing the ground of debt was not a fatal defect.

Bond of Corroboration.—This deed is employed, when it becomes necessary to enlarge or vary the original security, or to extend the effect of the original obligation, after the death of the creditor or debtor, to their respective representatives. BOND OF CORROBORATION.

When the interest of a debt has remained unpaid, it may by a bond of corroboration be accumulated with the principal, so that the accumulated amount shall thenceforth bear interest. When a new loan is to be added, as well as the arrears of interest, this is also effected by a bond of corroboration, the narrative of which, by a clear detail, will preserve a record of the origin of the whole debt. When a new obligant joins, or is substituted for, a previous obligant now discharged, this is effected by a bond of corroboration, of which an example has already been exhibited in the renewal of a bond for a bank agent. Here, for reasons formerly stated, it must be made clear, whether or not the new obligant comes forward at the request of the other cautioners, as, in that case, he will be entitled to total relief against them. Upon the death of the creditor in a bond, a bond of corroboration by the debtor to his executor or other representative may be convenient in supplying the place of a title. And, if the debtor dies, the expense and delay of a suit to constitute the debt against his representative will be saved by the representative granting a bond of corroboration. Forms applicable to these various circumstances, and to some others, will be found in the Juridical Society's Styles. The deed narrates the original ground of debt, and the circumstances which render the bond of corroboration necessary, or the object which it is designed to effect; and the obligatory clause commences thus:—"Therefore, and in corroboration of the original bond above narrated, and without prejudice thereto, or to any diligence that has followed or may be competent to follow thereon, SED "ACCUMULANDO JURA JURIBUS," &c. These terms prevent the objection being taken, that proceedings which may have been had upon the original bond are superseded by the corroboration. It then goes on to bind the granter or granters, and their heirs, &c., for the sum, or accumulated sums, as it may be, in the same terms as in the original bond, and with the same provision by a clause of registration for summary execution.

The necessity of preparing bonds of corroboration with the same care and accuracy as other formal deeds is strongly exemplified by

PART II.

CHAPTER I.

BOND OF CORROBORATION,
contd.

M. 17040.

the case of *Coult v. Angus*, 12th July 1749, of which there are three reports in the Dictionary, the second of which is a very elaborate one by Lord KAMES. Here the principal sum was omitted in the obligation to pay in a bond of corroboration, and the representative of one of the obligants, who had not been bound in the original bond, was in consequence held not to be bound. On the other hand, the maxim—"non creditur referenti, nisi constet de relato"—is not admitted with respect to bonds of corroboration. For here the obligation referred to is not left to stand only upon its own strength, but a new and independent obligation is granted. A bond of corroboration, therefore, may be sued on without producing the original bond; *Beg v. Brown*, July 1663; *Johnston v. Orchardtown*, 24th February 1676.

M. 16091.

M. 15798.

M. 1114.

M. 1027.

Bonds of corroboration are struck at by the Act 1696, cap. 5, which renders void all voluntary deeds granted by a debtor to his creditors within sixty days before bankruptcy; *Mackellar's Creditors v. M'Math*, 1st March 1791; and they are also reducible under the Act 1621, cap. 18, which nullifies voluntary deeds granted during bankruptcy to the prejudice of prior creditors; *Dunbar's Creditors v. Grant*, 18th June 1793. Bonds of corroboration received in such circumstances, therefore, must be regarded as of no value, and the party must betake himself to such diligence as in the circumstances may be available. In the case last cited, the creditor, had he not trusted to the inoperative deed, might have made his debt effectual by adjudication.

We have now reviewed the principal deeds by which personal obligations are constituted. There are others, of which precedents will be found in the collections of Styles; and among them there is the bond of presentation, to which we shall advert when treating of Diligence; but we have now examined those which develop the essential principles of conveyancing in this department, and we shall, therefore, proceed to consider the writings by which moveable obligations may be transmitted.

CHAPTER II.

THE INSTRUMENTS BY WHICH OBLIGATIONS ARE TRANSFERRED—THE
ASSIGNATION, TRANSLATION, AND RETROCESSION.

WE have now examined the constitution of obligations by deed in the simple form of the bond. We shall still have occasion to look at obligations in other deeds more or less complex, particularly in contracts. But it will tend to simplicity, and perhaps to a more distinct perception than might otherwise be obtained, of the nature and effect of the succession of legal instruments employed in the constitution, transmission, extinction, and enforcement of moveable rights, if, immediately after considering the obligation by bond, we proceed to trace it directly through these stages. We shall now proceed, therefore, to treat of the transmission of moveable rights, and particularly of the assignation.

Moveable rights are distinguishable into two classes; 1. Those, by virtue of which we possess the *ipsum corpus* of the thing, and which are called moveable corporeal or moveable real rights; and 2. Those which relate not to things actually possessed, but to claims at the instance of the possessor against other parties, and which he may recover from them by action at law. The furniture, books, and plate in a person's house, are corporeal moveables, held by possession. The sum owing to me by another upon his bond is an incorporeal moveable, held not by possession of the thing, but by right of demand and recovery from another party. By the law of England these are distinguished into rights in possession, and rights, or choses, in action—that is, things which may be recovered by legal suit.

DIVISION OF
MOVEABLE
RIGHTS.

In the class of moveable real rights, property is, for the most part, transferred simply by a removal of the possession to the new owner, without any written transfer, possession being in this class of things the evidence of title. In certain circumstances it is usual and expedient, and, in some instances, it is necessary, that the transfer, even of corporeal moveables, should be made in writing; but this class of

TRANSMISSION
OF MOVEABLE
REAL RIGHTS.

PART II. instruments is limited and peculiar, and we shall afterwards examine it separately.
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Inst. iii. 5, 1. Both of the classes of rights referred to may be transferred by what Mr. Erskine calls *legal assignation*, in two ways—either by the mere act of the law, as in the transference of moveables by marriage—or by judicial sentence, as a decree of forthcoming, or the confirmation of the commissaries. It is not our present purpose to treat of these. Nor do we design to examine, at this time, one most important medium of transmission of moveable property, viz., the transference of bills by indorsation—the simplest form of written transmission, which the law knows—but it will conduce to perspicuity, that the whole subject of bills of exchange, which form in all their details an exception from the ordinary rules of conveyancing, should be presented in a separate and united view; and the consideration of transference by indorsation will, therefore, be embraced in the discussion of bills and promissory notes.

TRANSPER-
OF MOVEABLE
OBLIGATIONS
BY ASSIGNA-
TION.

What is to occupy us at present is the transference of moveable obligations, which is effected by an instrument called the assignation.

Jur. Styles, ii. 317. The original form of this deed—a form which still, with some modifications, prevails to a great extent in practice—is very singular, and not in accordance with the directness and simplicity which characterize our legal instruments in general. Upon referring to the style, it will be found that the transferring clause of the assignation is not couched in words of direct conveyance. It is not “*I transfer*,” or “*I convey*” or “*I assign*” the subject to A. B.; but, after narrating the subject, and stating the cause of granting, the transference is effected in these words:—“*I make, constitute, and appoint A. B., and his heirs, &c., my lawful cessioners and assignees in and to*” the subject-matter assigned. Thus, instead of transferring the thing to the assignee, the deed designates the assignee as its recipient and future owner.

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THE ASSIGNA-
TION.
i. 176.

The origin and history of this peculiarity of style have been clearly traced by Mr. Ross in his discourse upon the assignation. Our limits will prevent our doing more than shortly indicating the chief causes, to which the singularity of form is to be ascribed. By the ancient law of England, as well as Scotland, rights created by obligations were not transmissible. This is stated expressly by Blackstone and by Stair, when he says, that “generally all obligations are intransmissible upon either part directly without the consent of the other party, which is clear upon the part of the debtor, who cannot, without consent of the creditor, liberate himself, and transmit his obligation upon another;” and he adds afterwards—“neither can a creditor force his debtor to become debtor to another, without his own consent, as when he takes him obliged to pay to him or his assignees.” The same doctrine is also referred to by Erskine, as

Inst. iii. 5, 2.

formerly subsisting; and Mr. Ross ascribes its source to the manner in which property was viewed, as consisting either in possession or in right of action, and to the notion, that, when a right was recoverable only by action, it was necessary that the creditor should himself personally exercise the right, assignments being forbidden by the common idea, that, as expressed by Blackstone, it would be "a great encouragement to litigiousness if a man were allowed to make over to a stranger his right of going to law." It is obvious, that a rule, which prevented the transmission of debts, could not long survive the introduction of commercial habits and necessities. Among the chief alterations in the administration of private justice subsequent to the Revolution of 1688 Blackstone specifies, "the introduction and establishment of paper credit by endorsements upon bills and notes, which have shewn the possibility (so long doubted) of assigning a chose in action." But the formal assignment, when first introduced, had not the direct character and complete effect of transmission by indorsation. Being prevented by the prevalence of the ancient opinion from granting a transfer of his right of action, the party effected his object by conferring on him, upon whom he desired to devolve the right, the character, not of absolute proprietor, but of a delegate to sue in name of the real owner. Accordingly, even before the period of 1688, the inconvenience appears to have been felt and obviated in certain social relations in England; for we are told that there the assignment was first introduced in favour of bastards, who could not be termed heirs, and so were provided for under the description of assignees—that is, persons appointed or delegated by others; and this was the expedient by which the operation of the rule of law was avoided. The party in right of an obligation or chose in action could not transfer the right, but he could always grant a mandate or power to another, as his attorney, to receive it in his place, and to sue for it if necessary. Thus, when one purchased a debt constituted by obligation, he received as his title a deed corresponding to a power of attorney, whereby he was appointed attorney for the granter, and so entitled to sue in the granter's name. Thus the strict rule of law was not encroached upon, and the purchaser or assignee was held to be attorney, not for the granter's behoof, but for his own. He was *procurator in rem suam*. It was evidently necessary, however, to the efficacy of this mode of transference, that the mandate or power given should, contrary to the ordinary nature of mandates, be irrevocable; and this element in the assignation Mr. Ross has traced to the practice of the French law—a source from which the lawyers of Scotland were not indisposed to borrow during the reigns of James the Fourth and Fifth. A direct conveyance of a debt in France was termed *un transport*—the granter, *cedant*; and the grantee, *cessionnaire*; and these names of the parties, derived

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Bythewood's
Conveyancing,
ii. 127.

from Latin origin, have been introduced into our law, the grantor of an assignation being termed the cedent, and the receiver the cessioner. The effect of the French transport was also adopted, our assignation being made to operate as a complete transfer, although it still retained the form which indicates its primary terms and import as a power of attorney. The English assignment, as it now exists in practice, contains evidence of its origin in the condition of the law which has been described. Thus, in the assignment of an annuity, although words of direct conveyance have been introduced, and the annuitant now "doth bargain, sell, and assign unto the purchaser, his executors," &c., the mode of making the transfer effectual is the same, the annuitant nominating and appointing the purchaser, his executors, &c., his true and lawful attorney and attorneys irrevocable, in the name of him (the annuitant) to demand the amount, upon failure to prosecute suits, and upon payment to discharge. Since the time of Craig and Balfour, the assignation has operated as a direct conveyance of all those rights capable of transference, which consist of debts and claims demandable from others.

We are thus taught the original distinction between deeds which are designed to transfer a right of claim, or *chose in action*, and those by which property itself is actually transferred. When the *ipsum corpus* is handed over, as is done actually in a transfer of moveables, and symbolically in a transfer of land, the word is that which indicates a change in the position of the thing sold—viz., "*Dispono*," I change the position of, I hand over, the thing sold. When the right sold cannot be delivered, being due by another's obligation, the term is that which expresses delegation—viz., "*Assigno*," I mark out or appoint a receiver. Thus, the disposition receives its name from the effect of the transfer upon the property, the assignation from the right which it confers upon the assignee. The term "disposition" is, accordingly, applicable to a transfer of moveable goods capable of delivery, as well as to a conveyance of lands; and Mr. Erskine is wrong in censuring the application of the term to transmissions of moveable goods, while the criticism of Mr. Ross upon this ground is just. The distinction is correctly marked in Spottiswoode's Introduction to the Style of Writs, where he says:—"An assignation is a writ of conveyance, and applied only to such as relate to moveable sums, rents, or duties; for, when other moveable goods, as plenishing, merchandise, or the like, are conveyed, the writ is called a disposition."

In considering the assignation, it is to be noticed as a first and necessary condition, that the debt has not been paid to the original creditor. If it has been paid, then there is no longer any debt to assign. If it has not been paid, still the assignee must have a personal knowledge of that fact; for, in the event of the debtor's bank-

Inst. ii. 7, 2.

I. p. 189.

p. 33.

ruptcy and sequestration, the claim upon his estate will consist of an affidavit by the assignee, bearing that the debt has not been paid either to the cedent or to himself; *Glen v. Borthwick*, 19th January 1849. PART II.
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11 D. 387.

We shall now shortly examine the form of the assignation. It usually embraces these parts:—

1. A narrative of the ground of debt conveyed.
2. The cause of granting, or consideration, called in the Juridical Styles the subsumption.
3. The clause of assignation.
4. The clause of warrandice.
5. The clause of delivery of the ground or grounds of debt.
6. The clause of registration; and
7. The testing clause.

1. *The narrative.*—The purpose of this clause is distinctly to specify the debt assigned, and the ground upon which it stands. When the assignation is simply of a bond, the narrative may be dispensed with, the debt being described in the assigning clause as contained in a bond, specifying the date. Of this form there is an example in the Juridical Styles. But, when there is more than one ground of debt, or when diligence has been done, or the transmission is in consequence of transactions more or less complicated, it is necessary, for the sake of perspicuity, that a basis be laid for the assigning clause by a distinct and comprehensive narrative. It is, of course, essential that the ground of debt be described in such terms as to identify it; and the practitioner should study to exclude every chance of dispute by rigid accuracy. It is true that assignations have been sustained, notwithstanding errors in the narrative—as, for example, where the bond was described as granted in the year 1606 instead of 1696; *Dickson v. Logan*, 19th February 1716. In such cases, there is less danger to be apprehended in a question with the granter of the deed containing the blunder, than in questions with his creditors, who have not his means of knowledge, and can plead such errors with better effect. The practical lesson is to exclude the risk of question by studious accuracy. NARRATIVE OF
THE ASSIGNA-
TION.
ii. 318.
M. 4153.

2. *The cause of granting.*—In the assignation of a bond, the consideration is the receipt of the amount from the assignee; and, whatever may be the nature of the consideration, it should be clearly set forth, so that, if it be gratuitous, that may appear, this being of importance with a view to the question of warrandice. It is yet more important to state the consideration distinctly, when it is equivalent to the right acquired. If the value of the consideration do not appear from the mere statement, then the narrative of it may bear, that the parties hold the consideration arising out of the circumstances set forth to be equivalent, or a due price or satisfaction, for the thing CONSIDERATION
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M. 9214.

assigned. It may be noticed, that a factor cannot acquire for his own benefit by assignation or otherwise, a right connected with his constituent's estate, even although his appointment may contain power to that effect; *Murray v. Murray*, 16th June 1710. This arises from the jealousy with which the law regards a factor's actings in relation to his constituent's estate. The same principle also applies in the case of tutors and other guardians, whose acquisitions in connexion with their pupil's property are held to be made for the benefit of their ward.

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ASSIGNATION.

I. p. 208.

3. *The assigning clause.*—This is in the terms we have already noticed as shewing the assignation to have been, in its original nature and effect, a power of attorney authorizing the assignee to recover the claim:—"I have made and constituted, as I hereby make, constitute, and appoint, the said D., his heirs and donators, my lawful cessioners and assignees, not only in and to the foresaid principal sum of £100," &c. The words in the past tense, "I have made and constituted," express the antecedent purpose and resolution to grant the deed; and the same terms repeated in the present tense are the efficient words by which the transfer is actually made. The meaning of the term "*donators*" is explained by Mr. Ross, as arising out of the practice of the Crown to make gratuitous grants of the estates of attainted persons in favour of their connexions or of trustees for them. The recipients of these grants were termed donatories, and the word was adopted by subject-superiors in disposing of lands belonging to forfeited persons, which fell into their hands by the operation of the feudal law; and, as it was only in the style that they imitated the Royal practice, (for subject-superiors generally exacted a price,) so the word "*donators*" came to be adopted in legal instruments as synonymous with grantee or assignee. The word "*heirs*" in the destination of an assignation is subject to the same rules of interpretation to which we have adverted on the subject of the personal bond, and it will, therefore, be construed according to the nature of the right. If the right be moveable, as in a personal bond to heirs and executors, then the word "*heirs*" in the assignation will mean the executor, who is *hæres in mobilibus*. If the right be heritable, then the term "*heirs*" will carry it to the heir-at-law, who is the proper heir in such a right. This point demands particular attention in the assignment of bonds secluding executors. We have already seen that by the case of *Ross v. Ross*, 4th July 1809, it was settled, that bonds secluding executors are heritable *sua naturâ*. They cannot be transmitted by testament, the heir's title to them is made up by general service, and they can be attached by adjudication—all forms of law applicable to heritable property. If, therefore, a bond secluding executors were assigned to a party and his heirs, or, in terms of the Style now under consideration, to his heirs and

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donators, such a destination would appear to carry it to the heir-at-law ; and it was so decided in the case of *Kennedy v. Kennedy*, 17th November 1747, the destination being to the assignee and his heirs. It had been found, however, in the previous case of *Sandilands v. Sandilands*, 17th June 1680, that, where a bond secluding executors was conveyed to a party and his heirs and executors, it belonged to the executor, and not to the heir-at-law of the assignee. The assignation was thus held to create a new destination, which took off the effect of the exclusion in the bond, so as to make it descendible to the assignee's executors. From the heritable nature of bonds secluding executors, they cannot be assigned upon deathbed ; *Mackay v. Robertson*, 12th January 1725. The word "*cessioner*" may be qualified by the term "*irrevocable*," as is done, we have seen, in the English style. This word marks the transition of the assignation from the character of a mere power of attorney to an absolute conveyance ; and the same remark is applicable to the words "*in and to*" the sum conveyed, which have been introduced at the period when the assignation was converted into a real as well as a virtual transfer.

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CONT.
M. 5499.
M. 5498.

M. 3224.

By this clause the ground of debt—that is, the bond or other document, is assigned, as well as the debt itself, a practice which Mr. Ross traces to the principles of the Roman Law, according to which the vouchers (*nomina debitorum*) were in some respects regarded as separate from the debt. Along with the bond is assigned "*all that has followed*," which means diligence already done, or "*is competent to follow*"—that is, the power of doing diligence. These rights transmit, although not expressed. Next come the terms "*surrogating and substituting*" the assignee in the cedent's full right and place. These words also form a part of the process, by which the assignation grew out of a power of attorney into a real conveyance. The word "*surrogate*" is derived from the Roman Law. It is of frequent use in the ecclesiastical law of England, and expresses, in the same way as "*substituting*," the placing of one person in the room of another. The assigning clause concludes with giving power to the assignee and his heirs, &c., to demand, receive, and discharge, or convey, the debt, and generally to do everything concerning the premises, which the cedent could have done before granting the assignation. We shall presently have occasion, after examining the whole Style, to inquire into the nature and extent of the assignee's powers. At present, we need only remark, that, although it is proper to insert this part of the Style, the assignation would be equally effectual if it were omitted, all the powers which it bestows being inherent in the character of assignee, and transmitted by necessary implication along with the debt. This was expressly found in a case reported by Haddington, and noted by Stair, iii. 1, 4. but not apparently transferred to Morison's Dictionary ; *Johnston*

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iii. 1, 4.

M. 16467.

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TIONS.

v. *Jack and Others*, 12th December 1622, where cautioners, whose obligation was assigned, objected that power to sue and recover was not given by this clause, which mentioned only the principal debtor; but the plea was rejected, the clause being considered not necessary. In conclusion, as regards the assigning clause it is to be carefully observed, that, although the appointment of cessioners and assignees is the original method of transferring rights to obligations, yet such rights may be as effectually assigned by words of direct conveyance—by any words, in short, which clearly import a transmission of the right. In the words of Lord Stair, “any terms that may express the transmission of the right from the cedent to the assignee will be sufficient; as if the cedent assign, transfer, and dispone, make over, set over, gift, or grant the thing assigned to the assignee, or nominate or constitute him his cessioner, assignee, donator, or procurator to his own behoof.” Mr. Ross, in his zealous adherence to the forms, of which his own research has developed the origin and significance, has censured this passage; but there is no doubt that it contains an accurate statement of the law. But in order to transfer the right to a bond, words legally implying transmission must be employed. A bond cannot be transferred by indorsation like a bill; and a bond was found not to be assigned by a holograph order in these terms:—“I desire you may transact the enclosed bond to the bearer, Mr. James Hunter, in his own name;” *Farquhar v. Hunters*, 11th June 1715.

4. *The Clause of Warrantice*.—By the ordinary style, this clause is in these terms:—“*Which assignation above written I bind and oblige myself, and my foresaids, to warrant to the said D. and his foresaids, from all facts and deeds done or to be done by me in prejudice thereof.*” The warrantice of assignations has already been fully examined in treating of the clause of warrantice as one of the common clauses of deeds; and it is unnecessary again to enter into a minute detail of what was then stated. We found that the implied warrantice of assignations is *debitum subesse*—that a debt truly exists; but that this does not import the solvency of the debtor. Previous to the year 1671, absolute warrantice expressed in an assignation—that is, warrantice at all hands and against all mortals, was held to import an obligation upon the cedent to make good the debt. But, by two decisions in that year, this doctrine was corrected, and absolute warrantice of an assignation was restricted, in conformity with the general principles of warrantice in conveyances, to a guarantee of the title, and not of the subject-matter of the conveyance; so that, in assignations, absolute warrantice means only a guarantee that a debt exists, and that the assignation gives a good title to it. We found the same principle applied, where the cedent warranted the sums transferred to be “*good, valid, and effec-*

“*tual*,” these words implying merely that there is a good legal title. PART II.
 It is very important also to remember the case of *Ferrier v. Graham's Trustees*, in 1828, in which an assignation contained warrandice in the usual terms, which we have quoted, and it was held by the Judges, that the warrandice expressed left the warrandice implied from the nature of the transaction untouched—the general rule being, that, when a debt is assigned, there is implied the warrandice *debitum subesse*. It is not easy apparently to reconcile this doctrine with the general rule, by which implied warrandice is controlled by that which is expressed. But the rule is settled by the decision referred to, and we may hold it, therefore, as fixed, that when an assignation contains warrandice according to the style which has been quoted, the cedent is bound not only in personal warrandice, that he has done and shall do nothing inimical to the assignee's right, but also in the implied warrandice, that there is a debt. The following then are the practical rules for the conveyancer's guidance :—

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 TIONS, *cont'd.*
 6 S. 818.

(1.) If no warrandice is expressed, the assignee will have the benefit of the implied warrandice *debitum subesse*, as well as warrandice from fact and deed in the degree corresponding to the nature of the transaction as gratuitous or onerous.

(2.) If the warrandice be from fact and deed, as in the style quoted above, the assignee will, in addition to the warrandice expressed, have also the benefit of the implied warrandice *debitum subesse*.

(3.) If the warrandice of an assignation be absolute “at all hands” and against all mortals,” this imports that a debt exists, and that the title is unexceptionable.

In these rules it is of course taken for granted, that the assignation is made for an onerous consideration. In a gratuitous assignation the cedent is liable in simple warrandice merely—that is, that he shall do no voluntary act inconsistent with the assignee's right, unless he shall choose to give warrandice of a higher order in express terms.

It is proper to notice, also, that warrandice of debts extends to their amount, although less be paid for them. In *Houston v. Corbet*, M. 16619. 22d February 1717, an assignee became bound to warrant his assignation of a debt from the fact and deed of himself and of his cedent. It was afterwards found, that the cedent had got payment of a part of the debt. The assignee pleaded that he was liable only for the amount paid to him for the conveyance of the debt. But he was subjected in the full amount thereof.

5. *Clause of Delivery of the Grounds of Debt*.—This clause is very useful, and should never be omitted. Its benefit is chiefly to the cedent, whom it relieves of after trouble and responsibility by furnishing evidence, that the grounds of debt were delivered along with

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the assignation. If the whole writs are narrated in the assignation, the clause will simply bear delivery of them; otherwise, it will refer to an inventory subjoined and signed, or to a separate inventory docquetted and subscribed as relative to the assignation. If any of the writings cannot be delivered along with the assignation, written evidence of the fact should be preserved, and an obligation obtained either separately, or in the deed, (which is preferable,) either to deliver them within a specified time, or, if they cannot be entirely transferred, to make them forthcoming when required. If the grounds of debt be not delivered, the cedent is bound without any express obligation to that effect to deliver them; *Finlaw v. Earl of Northesk*, 25th June 1670.

M. 6544.

6. Then we have the clause of registration, and the testing clause, of which the objects, requisites, and effects, have already been fully explained.

DELIVERY AND
INTIMATION OF
ASSIGNATION.

Intimation of the Assignation.—We are next to consider what is necessary to complete the assignee's right, after the assignation has been properly framed and executed. We have already ascertained, upon the principles developed in treating generally of the delivery of deeds, that the first essential is, that the assignation be delivered to the assignee, with the intention of putting him in possession of it as the title of the right assigned. The will of the proprietor transferring the thing sold, accompanied with actual delivery thereof, is a sufficient title to the purchaser; but, when a written conveyance is requisite, as in the assignment of an obligation, a deed retained in the granter's possession may be cancelled or destroyed, and, therefore, there is no right transferred to the assignee until the deed is delivered. Having already fully discussed this subject, I shall only refer here to an illustration of its application to a deed of assignment in the case of *Hisleside v. Baillie*, January 1685; and also in that of *Dick v. Oliphant*, 24th January 1677, which affords an example of an assignment held effectual, although remaining in the cedent's hands, because he had raised horning upon it. The first requisite, therefore, is, that the assignee receive delivery of the assignation, and that forms a complete title as regards the cedent, who is thenceforth bound to regard the assignee as vested in the thing assigned. But how is the same obligation to be imposed upon others? How is the assignee's right to be fixed upon the thing itself which is assigned? In sales of corporeal moveables the thing sold must be delivered, otherwise no legal title is acquired by the purchaser, upon the maxim—*qui cedit et retinet, nihil agit*; and in a sale of lands, because there cannot be actual tradition, the delivery is made symbolically. Is then anything, equivalent or analogous to the delivery of the thing, requisite when the right transferred is not corporeal, but consists of a claim

M. 11496.

M. 6548.

against a third party, as in the case of a bond? Let us examine the position of matters. Where is the actual possession? Where is the money contained in the bond? It is in the hands of the debtor. The actual possession, therefore, if it can be so called, is in the debtor, subject to the cedent's right of demand. The thing required, therefore, is, that the debtor shall cease to hold for the cedent, and that his possession shall now be subject to the right acquired by the assignee. How, then, shall the debtor be made to hold on behalf of the assignee instead of the cedent? This is accomplished by simply making known to the debtor the transference of the right from the cedent to the assignee—that is, by *intimation* of the assignation. The principle of intimation was thus clearly stated by the Judges in the English case of *Ryall v. Rowles*—"In the case of a *chose en action*, you must do everything towards having possession that the subject admits. You must do that which is tantamount to obtaining possession, by placing every person, who has an equitable or legal interest in the matter, under an obligation to treat it as your property; for this purpose you must give notice to the legal holder of the fund. In the case of debt, for instance, notice to the debtor is tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person." In Scotland, the doctrine of intimation is founded upon precisely the same principle, viz. the attainment of as complete possession as the right admits of. This is stated in precise terms by Sir Thomas Craig, "*Civilis quædam possessio per intimationem concurrit.*" Intimation was recognised as necessary to complete the effect of the assignation in Scotland so early as in the fifteenth century, as is shewn in Balfour's Practicks, where he reports a case in 1492 to the effect that, if any creditor constitutes any person his assignee to the debt, the assignee should intimate the assignation to the debtor; otherwise, if the debtor pay to the creditor, or others authorized by him, before intimation, he cannot be compelled to pay to the assignee. It is the opinion of Stair and of Erskine, that intimation was originally designed merely to put the debtor *in malâ fide* to pay to the cedent or any assignee. But it has been long settled, that it is indispensable to the completion of the assignee's right. By Stair it is termed "a solemnity requisite to assignations," and by Erskine "an essential requisite," not only for interpellating the debtor, but for completing the conveyance. This is shewn by the following case:—I owe you £1000 by a bond. I obtain from another party an assignation of a bond granted by you to him for £1000. By the doctrine of compensation, the moment my right to your bond for £1000 is completed there is a *concursus debiti*

Jarman's Cou-
veyancing, v.
461, 3d edit.
1 Ves. senr.
484.

INTIMATION NE-
CESSARY TO
COMPLETION OF
ASSIGNEE'S
RIGHT.
p. 169.

iii. 1, 6.
Inst. iii. 5, 3.

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INTIMATION,
cont^d.

M. 837.
M. 2652.
Elchies, voce
"Compensa-
tion," No. 2.

M. 840, & 576.

F. C.

PRIORITY OF
INTIMATION THE
CRITERION OF
PREFERENCE IN
COMPETITIONS.

et crediti, and, therefore, the debt of £1000 owing by me would be extinguished by my right to the same sum owing by you. In order, therefore, to complete my right to your debt, I must intimate my assignation to you. But before doing so, I receive intimation of an assignation of my bond granted by you to another party. The result is, that as you are divested of the right to my bond before I have completed my right to yours, compensation does not take place. I remain debtor in my own bond to your assignee, and must take my chance of recovering the sum in your bond from you. Thus, it is clear that you, the debtor in your own bond, are effectually interpellated from paying to your original creditor, although the intimation of my right to your bond has been too late to complete my title so as to produce compensation, and, therefore, the effect of intimation is not limited to interpellating the debtor from paying to the original creditor, but it also completes the assignee's right. This case will be found exactly illustrated in *Wallace v. Edgar*, 22d January 1663; *Ferguson v. More*, 12th December 1665; *Barham v. Lord Mordaunt*, 29th November 1733. The same principle is also illustrated, and in a simpler manner, in the competition of assignations, in which, as we shall afterwards find, intimation, besides interpellating the debtor, confers a preference upon the party whose assignation, though posterior to the others in date, is first intimated. The effect of intimation is, as we have seen, to give a right *in rem*. As regards the cedent's personal obligation, that is completed by delivery of the assignation, and, if the assignee choose to rely exclusively upon the cedent's obligation and credit, intimation is unnecessary. But if, after the cedent has assigned to you, he shall take payment from the debtor, the assignee's remedy is limited to a personal claim against the cedent, and he has no claim against the debtor, because he did not make him aware that he had become his creditor; *M'Dowall v. Fullertoun*, 8th June 1714. If, again, the assignee do not choose to rely upon the cedent's personal obligation, and intimates his assignation to the debtor, then the debtor is bound to regard him as the creditor, and, if after intimation he shall pay to the cedent, then he will, notwithstanding, be still liable in payment to the assignee. This case occurred in *Hope & M'Cad v. Wauch*, 12th June 1816. The effect of intimation, then, as regards the cedent, is, that it does not increase his obligation under the assignation, but it removes the fund from his control; as against the debtor, the effect of intimation is that it lays him under an obligation to recognise the assignee as the creditor, and as possessing all the rights to demand payment and otherwise, which previously belonged to the assigner.

What is the effect of intimation as regards the creditors and other assignees of the cedent? The rule is clearly fixed, that, when two

assignments are granted of the same debt, the one which is first intimated is preferable, although it may have been executed and delivered of a later date than the other. This doctrine is held by all the institutional authorities, beginning with Craig, who says, that, if a right of reversion have been assigned to two different persons, that one, *qui prius jus suum insinuaverit, preferetur*. The word *insinuaverit* he afterwards explains to mean intimation. With regard to creditors, intimation is necessary before any attachment by them, in order to give the assignee a preferable claim ; and, if a creditor of the cedent obtain right to the debtor's property before intimation, the assignee is excluded. It was so found, where one of the creditors of a deceased party had granted an assignation to a debt, and one of his creditors had after his death made up a title to the debt as executor-creditor before intimation of the assignation. The creditor was held preferable; *Sinclair v. Sinclair*, 5th July 1726. It was formerly held that, after the sequestration of the cedent, an assignation previously granted by him might be completed by intimation, notwithstanding the sequestration, provided the intimation were made before the vesting of the estate in the trustee's person by the act of confirmation ; *Buchan v. Farquharson*, 24th May 1797. The later sequestration statute, 2 & 3 Vict. cap. 41, § 78, is, however, very express in vesting the moveable estate in the trustee "to the same effect as if actual delivery or possession had been obtained at the date of sequestration ;" and Mr. Bell in his commentary upon that statute is of opinion, that this clause has the effect of barring the completion of an uncompleted conveyance. In the case of *Eadie v. Mackinlay*, 7th February 1815, F. C. it was held, that a transfer of goods lying in the hands of an artificer required to be intimated to him in order to complete the right of the assignee, and that a creditor who had attached them by poinding before intimation of the transfer was preferable. The effect of intimation as a completion of the assignee's right is thus of vital importance, as it debars the debtor from paying to the cedent, and secures the fund from attachment by intimation of another conveyance, or by the diligence of the cedent's creditors. It is, therefore, the duty of the Conveyancer to use the utmost promptitude in making the intimation, and he will incur serious responsibility by any delay or neglect in this, which is a known point of duty. In the case of *Lillie v. Macdonald*, 13th December 1816, the heir of a law-agent was found liable for the loss upon a loan of £1000, negotiated twenty-five years before, on the ground that he could adduce no evidence of intimation having been made.

What is the form of intimation ? Now that despatch is so much studied, the formal process of intimation is rarely resorted to, when the object can be effected, as it generally can be, in a more

M. 2793.

M. 2905.

pp. 49, 167.

FORM OF INTIMATION.

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 MATION, *contd.*

succinct and convenient way. Yet the formal procedure, which is by notarial instrument, is sometimes the only method by which the object can be secured, as in the case of parties absent from the country, or of parties who refuse to hold communication, or of pupils and minors. We shall therefore shortly describe

Notarial Intimation.—The purpose is to fix a knowledge of the assignation upon the debtor, and to obtain evidence, recognised by the law as authentic, that the intimation was given. This is done by the intervention of a notary-public, whose office it is to attest the facts which he is called upon to authenticate. The procedure is as follows:—A person, acting as procurator or attorney for the assignee, goes along with a notary and two witnesses to the debtor, the procurator having in his hands the bond or other ground of debt, and the assignation. Formerly it was considered necessary that the assignation should be read over; according to modern practice, a copy attested by the notary is delivered to the debtor, and the procurator protests that he (the debtor) shall hold it as intimated, and shall not make payment to any other person than the assignee or his representatives, otherwise he shall be liable to the assignee for the sums contained in the bond and assignation, and also for damages and expenses. The procurator takes instruments in the hands of the notary-public, which is done by presenting a piece of money to him in the presence of witnesses. The intimation is generally made by putting into the debtor's hands a paper called a schedule of intimation, which is a written statement by the procurator, representing to the debtor the terms of the bond and assignation, intimating the latter, and protesting to the effect already mentioned. Of this schedule a form is given

ii. 351, 3d Edⁿ.

in the Juridical Styles. It is signed by the procurator, and may also be subscribed by the notary. The subscription of the latter is not necessary, but it is necessary that the notary satisfy himself of the statement in the schedule being conformable to the facts. The foregoing procedure completes the intimation. The evidence of it consists in a formal instrument, prepared and authenticated by the notary. This instrument contains a recital of the procedure, with an attestation that these things were so done. The instrument is subscribed by the witnesses along with the notary; and, as in this case they attest not the mere subscription, but the facts, the witnesses ought to sign every page. A form of the instrument of intimation is also given in the Juridical Styles, along with the schedule. This formal instrument constitutes authentic evidence that the debtor has been legally certiorated of the assignation.

There are some points here requiring attention. Lord KAMES, arguing too strictly upon the original character of the assignation as a mere procuratory, says, in his *Elucidations*, "that the intimation must be

“in the cedent’s name, as the assignee has nothing to say to the debtor but *quā procurator*.” But, since the nature of the assignation as an absolute conveyance is undoubted, it is certain that, in analogy with all similar procedure, the proper party to make the intimation is the assignee, for whose interest it is made. It is carefully to be noted, that the same person cannot act as procurator for the assignee, and as notary in making the intimation; for a notary is called to attest the acts of others, and not his own; *Scott v. Drumlanrig*, 3d July 1628. In this case an intimation so made was found null. It is advisable, although not indispensable, that the procurator have in his hands the bond or other original ground of debt, as an additional evidence of the assignee’s right, and of the implied authority to the procurator, which results from his possession of the assignation. But, although the bond may be dispensed with, it is certain that he cannot effectually intimate without producing the assignation, and that the execution of the intimation will be ineffectual, if it do not bear that the assignation was produced; *Watson v. Munro*, 9th December 1714. The statement in the schedule and instrument must be so explicit, as to exclude all doubt with regard to the identity of the debt assigned. In *Lourie v. Hay*, 17th June 1696, the instrument did not name the cedent, or the date of the assignation, or the *causa debendi*, and not being written on the back of the assignation, it might have referred to another debt. A competing intimation with a correct narrative was in consequence preferred, although subsequent in date. It is of course essential that the date be accurately stated; and in cases of importance and anxiety, it is advisable to insert the hour as well as the date. The effect of this is shewn in two cases reported in Spottiswoode’s Practicks—the first, *Inglis v. M’Cubie*, 28th January 1630. Here one creditor had used arrestment, and the other had intimated an assignation, upon the same day, and they striving for preference, the Lords, in respect of both their diligences concurring, would not prefer the one to the other, but divided the sum betwixt them. In the other case, that of *Balcanqual*, 30th January 1629, there was also an arrestment and an intimation upon the same day, and the Lords preferred the arrester, partly upon this ground, that the officer’s execution bore the hour as well as the day of arrestment, which hour was before the hour of intimation. In *Cust v. Garbet & Co.*, 8th March 1775, the instrument of intimation bore that it was made between the hours of eight and nine in the morning, and the assignation was, therefore, preferred to a confirmation granted the same day, the hour of cause in the Commissary Court not being until eleven o’clock. If the debtor is not found personally, then the intimation is made at his dwelling-house in presence of a notary and witnesses. The competency of an intimation at the

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MATION, contd.

M. 846.

M. 3687.

M. 849.

p. 76, voce,
“Creditors and
debtors.”

p. 20, voce,
“Assignation.”

M. 2795.

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M. 848.

FORM OF INTI-
MATION, *contd.*

dwelling-house, when the debtor was not found, was doubted in the case of *Hume*, immediately to be referred to; but the sufficiency of such intimations is now established by long usage. In *Hume v. Hume*, 26th July 1632, intimation at the market-cross of the head burgh of the sheriffdom, where the party dwelt, was found to be inept. When the debtor is abroad, it is the practitioner's duty to follow strictly the mode of intimation prescribed by law. Formerly the proper mode of intimation to a party furth of the kingdom was by execution at the market-cross of Edinburgh, and pier and shore of Leith; but this was afterwards regulated by the Act 6 Geo. IV., cap. 120, § 51, which enacts, that such citations and intimations shall be made by delivery of a copy thereof at the record office of the keeper of the records of the Court of Session. They are now, by A. S., 24th December 1838, § 7, made at the office of the keeper of edictal citations, since the disjunction of the offices of keeper of the records of the Court, and of keeper of edictal citations, by the Act 1 & 2 Vict. cap. 118. But as, in the words of Mr. Ross, it is only the voice of their Sovereign that absentees are obliged to hear, such intimations must be made judicially, and this is effected by letters of supplement under the Signet. The writ narrates the ground of debt and the assignation, and that the debtor is furth of Scotland, and it contains a charge to messengers-at-arms to pass with a notary and witnesses to the office, and there to make intimation. Of this writ there is a form in the Juridical

iii. 280; 2^d Edⁿ. Styles. As this is the mode of intimation to an absent person prescribed by Statute, it ought to be strictly observed, but that need not prevent notification by letter also. On the contrary, the Court will always regard favourably whatever exertion may be made to bring the matter to the actual knowledge of the party concerned. When there is more than one debtor, it is agreed by the authorities that intimation to one of them is sufficient to complete the conveyance; but it is carefully to be observed that, notwithstanding such intimation to a single obligant, if the debt shall be paid to the cedent by another obligant, who has received no intimation, then the assignee will have no redress. Accordingly, in *Lyon v. Law*, 23d February 1610, intimation having been made only to a cautioner, the Lords found that the principal debtor was in *bona fide* to pay to the cedent, and that he and all the cautioners were thereby liberated. It is sometimes difficult to determine to whom an assignation ought to be intimated, as in the case of a trading company or other collective bodies. The object should be to attain as nearly as possible to the same certainty of certification as is effected by personal notice to an individual debtor. Intimation to an hospital was held to be sufficiently made by service upon the treasurer of the incorporation; *Keir v. Menzies's Creditors*, 10th January 1739. It is evidently most de-

M. 1786.

INTIMATION
WHERE DEBTOR
A COMPANY OR
INCORPORATION.

M. 738.

sirable, however, in such a case, that the intimation should be entered upon the books of the incorporation. Acknowledgment in the books of a collective body appears to form the nearest parallel to the certification of an individual; and when thus recorded in a permanent form, it is beyond the reach of the objection, that by individual neglect the information has not reached the acting organ of the body. Entries of this description are now made as a matter of ordinary routine by insurance companies, acknowledging intimation of transfers of their policies; and certificates of such entries are given out to the parties, which form undoubted evidence of intimation. Such acknowledgment, however, can only be obtained by the voluntary consent of the incorporation or other body, and, where that is not attainable, the prudent course will be to intimate to all the officers. In the case of *Watson* M. 850. *v. Murdoch*, 19th November 1755, an intimation made to two clerks, who were also managers of a trading company, was held to divest the cedent; but in this case a minute of the intimation was entered in the company's books. The necessity of the greatest caution in dealing with such cases is shewn by the decision in *Hill v. Lindsay*, 7th Feb- 8 D. 472. ruary 1846, where an assignation by a partner of his share in a company's stock was held not to be duly intimated by the circumstance, that the assignee was *de facto* manager of the company, but without a regular appointment as manager. This judgment was given with considerable difference of opinion upon the Bench.

Equipollents to formal intimation.—Formerly intimation by a notary was held to be an indispensable formality, which could not be otherwise supplied, however strong might be the evidence of the debtor's knowledge, and, in the old case of *Stevinson v. Craigmillar*, M. 858. 27th January 1624, effect was denied to an assignation, although ratified by the debtor, because intimation had not been given by a notary. This notion, however, has now been long exploded, and intimation may be made by various other means, as effectually as in the notarial form, the law being satisfied, if it is made to appear that the debtor is truly certified. These other methods are termed *equipollents*—that is, steps equivalent to the formal notarial act. The first question which occurs, regards the legal effect of the debtor's private knowledge of the assignation, when no intimation has been made; and it is certain, in the first place, that the debtor's private knowledge cannot be pleaded by the assignee in a case where there is a competition of creditors, such private knowledge not being a completion of the assignment, which will, therefore, be postponed to debts secured by arrestment, or by assignations duly intimated. This is settled by the old decision of *Adamson v. Macmitchell*, 15th June 1624, and by other cases to a similar effect. It is a more difficult question, however, whether the debtor possessing private knowledge of an assignation is *in mala fide*, when there is no competition

EQUIPOLLENTS
TO INTIMATION.EFFECT OF
DEBTOR'S PRI-
VATE KNOW-
LEDGE.

M. 859.

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M. 865.

M. 873.

Inst. iii. 5, 4.

M. 866.

EQUIPOLLENTS,
contd.
 (1.) JUDICIAL
 ACTS.

M. 851.

M. 859.

(2.) DEBTOR'S
 WRITTEN EN-
 GAGEMENT TO
 PAY.

M. 860.

M. 4453.

Robertson's
 App p. 1.

M. 850.

15 D. 688.

(3.) PAYMENT
 OF INTEREST.
 M. 868.

Craig. & Stew.
 App. 44.

of creditors, to pay to the cedent. Such payment was found unwarrantable in the case of *Leith v. Garden*, 16th February 1703; but, in the later case of *Dicksons v. Trotter*, 18th January 1776, it appears to have been held not relevant to aver private knowledge of the assignation, as equivalent to intimation. A verbal promise by the debtor to pay is stated by Mr. Erskine to be equivalent to intimation, but there appears no sufficient authority for this; and by the case of the *Faculty of Advocates v. Dickson*, 25th July 1718, it was decided that a communing does not supply the want of intimation.

The first class of acts, which are reckoned equivalent to notarial intimation, are those of a judicial character—as, for instance, the institution of an action, in which the assignation is founded upon; or the production of it in a process to which the debtor is a party. It was so found, where the deed was produced in a multiplepoinding; *Dougall v. Gordon*, 17th November 1795. A charge of horning, in which the assignation is founded on, is an equipollent of a similar character. But, in the case of *Westraw v. Williamson*, 14th March 1626, an execution of inhibition was held not to amount to intimation, “the said inhibition not being *specific* execute.” The debtor’s written engagement to pay to the assignee is equivalent to intimation; *M’Gill v. Hutchison*, 22d January 1630. In the case of the *Earl of Selkirk v. Gray*, 22d July 1708, it was held in the Court of Session, that a holograph letter from the debtor promising payment was not equivalent to intimation; but this was reversed upon appeal. The debtor’s holograph acknowledgment of intimation is sufficient, and it does not require to be attested by witnesses; *Newton and Co. v. Collogan*, 23d November 1785. This is the practical mode of intimation, which is most generally observed. It is opposed, as we had already occasion to notice, to the general doctrine, that holograph writings do not prove their own date, and the decision in the case of *Newton and Co.* was pronounced on the ground of universal usage. In *Wallace v. Davies*, 27th May 1853, intimation by letter from the assignee’s agent to the debtor, with an answer returned by the debtor’s agent, was held sufficient; and an opinion was indicated on the Bench, that without the answer the letter of intimation, if found in the debtor’s hands, would have been sufficient, and that it is not necessary that the debtor should expressly acknowledge himself to be debtor. Payment of interest of the debt to the assignee is also equivalent to intimation. This was one of the points in the case of *The Earl of Aberdeen v. Merchiston’s Creditors*, 30th July 1729, in which the Lords held the circumstances not equivalent to intimation, but the judgment was reversed on appeal, *Earl of Aberdeen v. Earl of March*, 9th April 1730. This case also settles, that notice to a factor and a memorandum, made by him in the books of

his principal, that the debt is conveyed to the assignee, is sufficient intimation.

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Intimation may be proved *rebus ipsis et factis*, as by the attendance of the assignee at a meeting of proprietors, and acting and voting as in right of the cedent by virtue of the assignation. In such a case, the terms of the minutes of meeting not being sufficiently explicit, the party was allowed a proof by parole, that his assignation was produced and read at the meeting; *Hill v. Lindsay*, 10 D. 78. 12th November 1847.

(4.) INTIMATION
PROVED *rebus
ipsis et factis*.

There are various assignations, which, from their legal character or the circumstances of the parties, or from both of these elements combined, do not require intimation—assignations, for instance, which the law makes by its own strength, as an adjudication, which operates as a transfer of rents even without infeftment. An adjudication was, therefore, preferred to an arrestment; *Lord Justice-Clerk Home v. Fairholm*, 23d February 1671. Marriage also, which implies an assignation of the wife's moveables, requires no intimation. But these assignations, although they complete the right of the adjudger and husband, do not necessarily interpel the debtor, and, if he shall pay in ignorance, he will not be liable in second payment. An assignation by a woman before marriage is preferable, although not intimated, to the husband's right created by the marriage, because the previous assignation is an obligation or debt of the wife, which the husband is liable to make good; *Robertson v. Lord Halkerton*, 6th December 1673; *Till v. Jamesons*, 27th July 1763. The most frequent and familiar example of judicial assignation is that effected by sequestration under the bankrupt statutes, which, by the force of the enactment already cited, effects an immediate transfer of the bankrupt's property. No personal intimation of this assignment to the debtors of the bankrupt is required. Of this there is a striking example in *Adam v. Macrobbsie*, 17th January 1845, where a sum of money lying in bank in the bankrupt's name, and which never came into the trustee's hands, was held nevertheless to have been transferred to him by the sequestration, and not to be liable to arrestment by the bankrupt's subsequent creditors. The same is the rule with respect to an English commission of bankrupt, which, like marriage, passes personal property all the world over without intimation; *Selkraig v. Davies*, 23d March 1814. But an English deed of assignment pleaded upon in Scotland requires intimation; * *Carrick v. Dickie's Assignees*, 30th May 1822.

LEGAL AND
JUDICIAL ASSIG-
NATIONS RE-
QUIRE NO INTI-
MATION.

M. 2766.

M. 5776.

M. 2858.

7 D. 276.

2 Dow's App.

230.

1 S. 485.

* A pursuer obtained *interim* decree of payment in an action, upon the dependence of which she had used arrestments. She then raised a furthcoming, which was defended by the same parties, who had defended the previous action. They maintained that the funds in question had been specially assigned to them in trust for creditors by an English credi-

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INTIMATION
UNNECESSARY
WHERE DEED
REGISTERED
FOR PUBLICA-
TION.
M. 6304.

INTIMATION
UNNECESSARY,
WHERE DEBTOR
A PARTY TO
THE DEED.
M. 2876.
M. 868.
18 S. 818.

RIGHT ASSIGNED
MUST EXIST,
AND BE CAPABLE
OF TRANSMIS-
SION.

Personal intimation is unnecessary in deeds perfected by registration for publication—as, for instance, the assignation of a right of reversion; *Begg v. Begg*, 5th December 1665.* It is scarcely necessary, however, to remark, that the recording of an assignation, or other deed relating to a personal right, cannot in any respect supply the place of intimation, because the registers, appropriated to such deeds, are for the purposes of preservation and diligence, and even, if they were recorded in a register devoted to the purpose of publication, that could have no effect, since the lieges are bound to look there only for the deeds proper to that register in terms of the statute. Intimation is unnecessary, when the debtor is himself a party to the deed containing the assignation; *Charteris v. Sinclair*, 27th November 1707; *Turnbull v. Stewart and Inglis*, 12th June 1751; *Paul v. Boyd's Trustee*, 22d May 1835. The doctrine is contained in the note of Lord COREHOUSE, Ordinary, in the last case.

Effect of completed Assignation.—When an assignation is duly intimated, the immediate effect is to divest the cedent and transfer his rights to the assignee. In order to this result, it is of course necessary that the cedent have truly a right to transfer, and that the right he has be of such a nature, that it may be transmitted by assignation, since no legal instruments, however regular in their form and completion, will transfer a right which either does not exist, or which is incapable of transmission by the particular instrument employed. Therefore an assignation of a legacy, executed and inti-

tor-deed, before the date of the pursuer's arrestments; and that such creditor-deed operated, by the Law of England, a complete transference of the debtor's funds to the exclusion of subsequent proceedings by individual creditors. The Court held, that the defences were incompetent—that, even if they had been competent, the question, whether the English creditor-deed excluded the arrestments, related to a competition of diligence for attaching a fund in Scotland, and fell to be determined by the Law of Scotland, which requires intimation of the assignation—and that no intimation, or equipollent to intimation, of the creditor-deed had been proved; *Donaldson v. Ord*, 5th July 1855. In the previous case of *Wallace v. Davies*, 27th May 1853, the same question had arisen. There, a deed of assignment was executed by a party residing in England, in favour of English creditors, of sums due to him in Scotland. The Lord Ordinary (RUTHERFURD) expressed a strong opinion, that the deed did not require to be followed by intimation, to enable it to compete with arrestments used subsequently in Scotland. But the Court found it unnecessary to decide the point.

* Under articles of roup A feued lands from the exposor, who granted a charter in his favour. B, having subsequently acquired the lands, executed over them a bond and disposition in security, which was recorded in the register of sasines, in terms of 10 & 11 Vict. c. 50, § 1. B having become bankrupt, his trustee discovered that no valid feudal title to the lands had ever been constituted, and he, accordingly, sued the superior to grant a charter in his favour as trustee. The holder of the bond and disposition in security appeared, and claimed a preferable right. It was held, that under the articles of roup and charter the bankrupt had a personal right to the lands—that the personal right was carried by the assignation to writs in the bond and disposition in security—that the registration of this bond was equivalent to intimation of that conveyance of the personal right—and, therefore, that the trustee could only obtain a charter under burden of the bondholder's preferable right; *Edmond v. Magistrates of Aberdeen*, 16th November 1855.

17 D. 1053.

15 D. 688.

18 D. 47.

mated to the intended executor before the death of the testator, was held to be inept, for there was no debt, the legacy being revocable at the testator's pleasure, and there was no debtor to whom intimation could be made, the testator not being a debtor, nor could the executor hold that character, until his appointment became effectual by the death of the testator; *Bedwells v. Tod*, 2d December 1819. F. C.

Again, if the cedent's right be undoubted, that will not avail, unless it be of a kind transmissible by assignation. Thus alimentary rights cannot be assigned, for the transference of them is inconsistent with the fundamental condition of the grant, viz, the application of the fund to the grantee's personal support. This principle was applied in *Mackenzie v. Morrison*, 19th May 1791, where an assignment of M. 10413.

the annuity, payable to the widow of a minister under the Act 17 Geo. II. cap. 11, was found invalid. There are numerous cases to the same effect under the head PERSONAL AND TRANSMISSIBLE, in the Dictionary. The exception to the rule is in consonance with its principle, viz, that alimentary funds may be assigned for alimentary debts. This is illustrated by *Waddell v. Waddell*, 26th November 15 S. 151.

1836. Rights, enjoyed by virtue of a *delectus personæ*, are intransmissible—as an office, or an agricultural lease; and other rights falling under this head will be found specified in Erskine's Institutes. Assignment is not a *habilis modus* of transferring heritable property, or debts heritably secured; and so a posterior adjudger of an heritable debt was preferred to an assignee; *Anstruther v. Black*, 27th M. 829.

July 1626. But, although a proper heritable right is not transmissible by assignation, the proprietor's right to exact the rents of tenants in possession may be assigned, and an intimated assignation of rents to become due at future terms was held effectual in *Flowerdew v. Buchan*, 5th March 1835. A distinction was pointed out in Lord JEFFREY's interlocutor between arrestment, which attaches only what is past due, and assignation, by which both debts already due, and future and contingent debts, may be conveyed. 13 S. 615.

When the right of the cedent is undoubted, and is transmissible by assignation, then an assignation of it, duly intimated, not only divests the cedent, and clothes the assignee with the right, and the grounds of it, as specified in the conveyance, but it vests him also with diligence done by the cedent, and with every right corroborative of that expressed, although such corroborative rights be not mentioned in the deed. Thus, where a party, having right by assignation to two bonds, sued the son of the debtor, who was liable not as representing his father, but as having granted a bond of corroboration to the pursuer's cedent, which bond of corroboration, however, was not mentioned in the assignment, the son pleaded that the assignee had no title to sue him, because he had obtained no right to the bond of corroboration, the assignation not containing even the ordinary words of style, "with EFFECT OF INTIMATED ASSIGNATION.

- PART II. "all that hath followed, or may follow thereupon." But the corroborative right was held to pass by implication, through the force of the
CHAPTER II. assignation of the debt itself; *Cultie v. Earl of Airly*, 3d February
2 Br. Supp. 197. 1676. Upon the same principle the assignation of a bond under suspension was held to carry right to the bond of caution in the suspension; *Lyell v. Chrystie*, 11th March 1823.
- 2 S. 288. An assignation gives the assignee right to do diligence, and to pursue action, in his own name. Formerly this right was held to be precluded, if the cedent died before intimation, because, the conveyance being incomplete, the fund was held to be *in bonis* of the cedent, and it was necessary for the assignee, therefore, to get confirmation of the debt from the Ecclesiastical Court. This difficulty was removed by the Act of William and Mary, 1690, cap. 26, which declared, that assignations made by a deceased person, though not intimated in his lifetime, should be good titles to possess and pursue or defend, "albeit the sums of money or goods therein contained be not confirmed." The effect of this enactment is distinctly exhibited in the case of *Lyell*, last quoted. The subsequent Act, 1693, cap. 15, as we have already seen in examining the registration clause, enabled the holder of an assignation, though not intimated, to register it for execution after the death of the granter. By this Act also, the assignee of a right in a depending process is entitled, on production of his assignation after the cedent's death, to insist in the cause without requiring an action and decree of transference as formerly. A completed assignation empowers the assignee to proceed with diligence either in the cedent's name, if the cedent be alive, or in his own; *Grier v. Maxwell*, 20th November 1621. But, if diligence is once begun in the cedent's name, the subsequent steps cannot proceed in name of the assignee without judicial authority, for a messenger-at-arms is no judge of the validity or effect of a deed—his powers are limited to the terms of the warrant put into his hand, and he cannot, therefore, change the instance without a new warrant. In *Stewart v. Hay*, 11th June 1745, the Court remitted to the Keeper and Writers to the Signet, who reported that, in all cases of executors and assignees, it was the practice to raise new diligence, and the Court decided accordingly, that an arrestment used by an assignee in his own name without obtaining new diligence, was inept. Upon the same ground, a poinding was suspended; *Kyle v. Thomson*, 12th June 1813. But the competency of diligence by caption in the assignee's name, where the charge has been at the instance of the cedent, is shewn by *Young v. Buchanan*, 24th January 1799. In practice, it is prudent for the cedent not to allow diligence or action to be sued in his name, as he will be responsible for damages and expenses that may result. This is the rule followed by banks. If the debt be sued on at the cedent's instance, the debtor is entitled to refer to the cedent's oath, which
- EFFECT OF INTIMATED ASSIGNATION, CONTD.
- 1690, c. 26.
- 1693, c. 15.
- DILIGENCE MAY BE IN NAME EITHER OF CEDENT OR ASSIGNEE.
- M. 828.
- M. 834.
- F. C.
- M. 8137.

will affect the assignee; and generally the debt may be disproved by the cedent's oath before intimation, but not afterwards; *Pitfoddels v. Laird of Glenkindy*, 15th February 1662; *Fraser v. Fraser*, 12th February 1678. Even after intimation, however, the debtor can have access to the oath of the cedent, if he can prove by reference to the assignee's oath or otherwise, that the assignation has not been granted for an onerous cause. Generally, whenever the debtor can shew that the assignee holds the debt not on his own account, but in trust for another party, the debtor will have the benefit of whatever objections he can state to diligence at the instance of the party who has the true interest in the assignment. In *Knox v. Martin*, 12th February 1850, the consideration for the assignation having been truly paid by one not entitled to charge the debtor, the nominal assignee was held not entitled to charge him. This judgment bears also, that, where an assignation is *ex facie* absolute, it can be proved to be in trust only by the writ or oath of the grantee. The proof here consisted of books kept under the eye of the assignee, which were held to be his writ.

In considering the effect of a completed assignation, it is necessary to attend to the cases in which the cedent, although vested in the property conveyed, and *ex facie* absolute owner, is in reality a holder merely for the benefit of others, whose right does not appear upon the face of the title. The ordinary rule, *assignatus utitur jure auctoris*, was long held to settle, that the assignee could have no right or interest of any description in the thing assigned, which the cedent himself did not possess. A very important distinction, however, was taken by the House of Lords in the ruling case of *Redfearn v. Ferrier*, 26th May 1813. Here a share in a company was held by an individual, who, although he appeared to be the sole owner, was in reality a trustee merely for others, with whose funds the share had been purchased. The right of these others, however, did not appear in the company's books. The ostensible owner granted an assignation of the share in security of money lent to him individually, substituting the assignee in security in his full right and place, with power to sell. This assignation was intimated, and a competition having arisen between the assignee and those who were the true owners under the latent arrangement, the Court of Session gave effect to the rule *assignatus utitur jure auctoris*, and preferred the latent owners. The House of Lords, however, took a different view, and the opinions of Lord REDESDALE and Lord ELDON are very instructive. The former shews, by an examination of the *dicta* of the Institutional Writers, that the maxim applies only to questions between the debtor and the assignee, and is not applicable to questions arising between two parties, both claiming under the right of the cedent—that the party claiming upon the latent right was entitled only to compel an assignment, while the assignee had actually obtained and intimated such a con-

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M. 12454.

M. 844.

REFERENCE TO
OATH OF
CEDENT.

12 D. 719.

EFFECT OF COM-
PLETED ASSIG-
NATION, WHERE
ASSIGNER IS A
LATENT
TRUSTEE.—
*Assignatus
utitur jure
auctoris.*1 Dow's App.
p. 50.

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veyance. His Lordship, therefore, held it absurd to say, that the right of a latent trust should be preferred to an intimated assignment. The Lord Chancellor took the same view, and remarked:—"If latent equities were suffered to prevail against assignments, the effect would be that nothing could ever be assigned; for, as long as their Scotch neighbours retained any part of their characteristic shrewdness, they would never take an assignment, if they were aware that, by means of latent equities, such assignments might give them nothing." This important doctrine received effect in the subsequent cases of *Attwood v. Kinnear & Sons*, 11th July 1832; and *Burns v. Laurie's Trustees*, 7th July 1840; and it will be well for the young Conveyancer to fix in his mind the principle which they establish, there being frequent occasion in practical business to refer to it. On the other hand, parties dealing with the latent owner, who has the beneficial interest, are subject to his obligations to the ostensible owner, in whom the title stands. So, where a bank took in pledge from A, the real owner, shares registered in the name of B, and B. was afterwards called on to pay instalments, the bank was held bound either to relieve B. or to give up the shares, that he might sell and relieve himself; *Barron v. National Bank*, 28th February 1852. The rule, however, that a latent trust cannot compete with an intimated assignment, is limited to the case of special assignees, and is not available to creditors claiming under the general assignment effected by a sequestration. They take the property as it stood in their debtor, and, as they have no special assignment of the fund, the latent trust prevails over the general assignment, because the party entitled to plead it has in a manner a *jus in rem*. This is settled by the cases of *Dingwall v. M'Combie*, 6th June 1822; *Gordon v. Cheyne*, 5th February 1824.

Variety in the form of the assignment.—We have thus fully reviewed the terms and effect of the completed assignment. The principles which have been evolved in the course of the inquiry apply generally to all assignments, whatever may be the subject-matter conveyed. There are cases, however, in which the peculiar nature of the thing assigned occasions a variety in form and even in principle, and to these we shall now shortly advert.

TRANFERENCE
OF OPEN AC-
COUNTS.

F. C.

(1.) It was formerly held, that an open account might be transferred by an order to pay endorsed upon it, and that such order did not require a stamp, not being included in the descriptions contained in the acts; *Laurie v. Ogilvy*, 6th February 1810. The authority of this case, however, in so far as it was supposed to give to such an order the effect of a transference or assignment, is affected by a recent judgment, which narrows the exemption from stamp duty to the case of a mandate upon the account to recover for the mandant; and

settles that an order upon an account in these terms :—“ *Pay the* PART II.
“ *above sum of £ to A. B.*” is a bill, and requires a stamp ; CHAPTER II.
Sutherland v. Munro, 13th November 1847 ; and see cases there re- 10 D. 87.
ferred to.*

(2.) Policies of insurance are frequent subjects of assignment, and TRANSCERENCE
OF POLICIES OF
INSURANCE.
may be conveyed either by direct words of assignment, describing them by date, number, and amount, or, in addition to these particulars, the assignment may proceed upon a narrative of the terms of the policy. In the case of *The United Kingdom Life Assurance Com-* 16 S. 1277.
pany, 7th July 1838, it was decided, that the right to a policy is not transferred by mere delivery. In the words of one of the Judges :—
“ So important a right as that of a policy of life assurance is not
“ effectually transmitted from one party to another by merely pass-
“ ing the *corpus* of the policy from one hand to another without any
“ assignation or intimation being executed.” If bonus additions have
already accrued, or may be expected to accrue, the assignment should
bear explicitly, whether such additions are conveyed along with the
sum in the policy or are not. An assignment may be made of the
bonus additions alone, or of part of them, and such conveyances are
met with in the valuable policies of the old companies. The assigna-
tion is completed by intimation at the office of the insurance com-
pany, and practically, as has already been stated, there is no difficulty
in effecting the intimation, which is voluntarily received and acknow-
ledged by the Scotch offices. The English offices decline to grant
acknowledgments of intimation, but the purpose of it is effected by
leaving a notice of the transference at the office, and preserving a
certificate of the fact. The necessity of intimation is shewn by
Strachan v. M'Dougal, 19th June 1835, where an assignation along 13 S. 954.
with which the policy was delivered, was defeated, because not inti-
mated, by the diligence of a creditor of the cedent. In the assign-
ment of policies the great point of caution is to ascertain, that the
insurance has been well effected, since it is voidable, if the represen-
tations as to the party's health shall prove to be false. Another point
of anxiety in dealing with such instruments is not so much felt now
as formerly, viz. the fact, whether the insurance was made by a party
having an insurable interest. This is no doubt required in express
terms by the first section of the Act 14 Geo. III. cap. 48, and in strict
law the policy becomes ineffectual in the event of the interest ceasing.
Thus a creditor of William Pitt having effected an insurance on his
life for £500, and having after Mr. Pitt's death received payment
from his executors, it was held that he could not recover against the
office. The insurance companies, however, have not found it for their

* Where a sum is intrusted to a party for a special purpose, a letter, directing him to pay over the money in furtherance of that purpose, and held as intimated by the trustee, does not require any stamp ; *Brierly v. Mackintosh*, 1st June 1843.

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interest rigidly to apply this rule, and they generally pay without inquiry. With a view to these points, and to confidence in the transaction generally, it is obviously of the highest importance, that the assignee should have confidence in the trustworthy character of the parties with whom he deals; otherwise, he may be exposed to great embarrassment and difficulty in making good the claim. Thus, he must have reasonable certainty that the necessary certificate of death will be attainable when that event shall occur; otherwise, he may not be able to recover payment, but, on the contrary, be forced to continue disbursements for premiums as a measure of precaution to prevent the lapse of the policy.

ASSIGNMENTS OF
SALARIES OF
OFFICES.

(3.) From the observations formerly made in treating generally of objections to deeds arising from their subject-matter, it is evident that the assignation of the salary of an office is, in some instances, absolutely incompetent, and it must be regarded, under any circumstances, as an undesirable species of security.

ASSIGNMENT OF
PATENT RIGHTS.

(4.) A patent right may be assigned, but this must be done with a due regard to the conditions of the right, which always provide that the patent shall be void, if transferred to more than five persons. There does not appear to be any mode of intimating the assignment of a patent, and the assignee must, therefore, confide in a large measure in the trustworthiness and credit of the patentee. It is now settled by *The Advocate-General v. Oswald*, 20th May 1848, that the right of a patent invention is personal property.

10 D. 969.

ASSIGNMENT OF
COPYRIGHT.

(5.) Literary property or copyright may also be assigned, and the assignment made effectual by observing the provisions of 5 & 6 Vict. cap. 45—an Act to amend the law of copyright.

ASSIGNMENT OF
BANK-STOCK.

(6.) The stock of banks and of other mercantile companies is generally made assignable only according to certain forms and regulations, prescribed by the act or deed of incorporation or constitution. These forms must of course be observed. But, although compliance with them is indispensable to an absolute transfer, so as to constitute the assignee validly and effectually a partner of the company in place of the cedent, such compliance is not indispensable in order to create an available interest. Thus a partner of a railway company, having assigned his shares in security of a debt, and the assignation having been intimated in ordinary form, this was held to complete the security, and a subsequent arrester was held not entitled to plead that the forms of transfer prescribed by the statute incorporating the company had not been observed; *Thomson v. Fullarton*, 23d December 1842. Peculiar forms of transfer can be pleaded only by the bank, and where the essentials of a transfer and intimation have been observed, it is irrelevant for a third party to found on such private rules; *Weatherly v. Turnbull*, 3d June 1824; *East Lothian Bank v. Turnbull*, 3d June 1824. When the partner of a private company

5 D. 379.

3 S. 92.

3 S. 95.

assigns his share of the stock, the proper intimation is, of course, to the other partners, or, it may be, to a manager regularly constituted; and, where there are only two partners, it has been held unnecessary to intimate an assignation by the one partner to the other of his share of the stock; *Russell v. Breadalbane*, 3d July 1827—a case in which 5 S. 891. the opinion of the Consulted Judges bears, “that the legal form of “intimation is not necessary to complete an assignation, whereby one “of two partners assigns his share of the company stock to the “other.” The decision was affirmed on appeal; 4th April 1831. 5 Wil. & Sh. App. 256. Here intimation was made to the acting manager and cashier of the company, in consequence of the assignment having for a long period of time been latent and not acted upon. In practice the prudent Conveyancer will see that proper entries are made in the books of the company in such a case, clearly expressing the transfer, with the names of the parties, and its extent and date.

The Translation.—In what has hitherto been said of the transmission of obligations, we have considered only the case of transference by the original holder. When a debt is conveyed not by the first creditor, but by his assignee, to a third party, the deed by which this is effected is called a translation. The settled form of the translation is not founded upon the original nature of the transmission of obligations as a procuratory *in rem suam*; and this is to a certain extent explained by the nature of the case. It was quite competent for the creditor in an obligation to appoint an attorney to recover and receive it, but it was inconsistent with the nature of mandate that the attorney should delegate his office to another. Therefore, the assignee being, according to the original theory of his right, a procurator merely in the eye of the law had no power to nominate an attorney. Hence the translation assumed the form of a direct conveyance; and, while the assignation contains in its terms, as we have seen, unequivocal evidence of its primary purpose to effect a transference of an intransmissible right under the colour of a mere power of attorney, the translation marks an epoch when such a covert mode of transference was found to be inapplicable, and exhibits a direct conveyance resorted to under the pressure of a legal necessity—thus doing in express terms what the assignation also does in effect, although it only expresses it by circumlocutions and implications superinduced upon its original phraseology of delegation. These remarks are illustrated by the style of the translation of a bond contained in the Collection of the Juridical Society. It narrates the ii. 354, 3d edit. bond and assignation, the terms of the bond being articulately and distinctly set forth. This is necessary to perspicuity, because this narrative is the index and measure of what is afterwards transmitted

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THE TRANSLATION, *contd.*

in the conveying clause. After the cause of granting, the deed proceeds:—"Therefore I have transferred and made over, as I do hereby transfer, convey, and make over to and in favour of the said A., &c., the foresaid sums, &c." This clause forms the chief or only distinction between the translation and the assignation in its primary form; and it is unnecessary to recapitulate the other clauses, which with the remarks relating to them are all equally applicable here. The grounds of debt must be delivered according to enumeration in the body of the deed or in an inventory. The translation is completed, like the assignation, by intimation. If the assignation has not been intimated, the grantee of the translation must, for his own security, intimate it also, for which purpose it is, of course, essential that he produce both deeds, so as to certify the debtor that his title is derived from the original creditor. The transference of a debt by the holder of a translation to another party, and all subsequent transferees, are called conveyances or transmissions. In every essential particular their form and mode of completion are the same as those of the translation. The whole previous transmissions ought always to be set forth in the narrative, so as to deduce the right of the new holder by an unbroken chain of connexion from that of the original creditor. When a debt is conveyed by an assignee, or by any subsequent transferee, not to a stranger, but to a previous creditor or cedent, the deed is called

THE RETROCESSION.

Jur. Styles, ii.
359.

The Retrocession—a word, which means a yielding or giving back. The peculiar words of style in this case are, after narrating the bond and previous transmissions with the cause of granting—"Therefore I have reponed, restored, and retrocessed, as I do by these presents repon, restore, and retrocess the said A., &c., in and to his own right and place of the foresaid principal sum, &c., as fully and freely in all respects, as if the said assignation, &c., had never been granted." This writ is, therefore, analogous to the assignation in form, in so far as it effects its object, not by conveying back the subject of the transmission, but by re-instituting the cedent in the place of creditor. The retrocession must, of course, be intimated.

CHAPTER III.

THE INSTRUMENTS BY WHICH OBLIGATIONS ARE EXTINGUISHED—THE
DISCHARGE.

WE have now examined the deeds by which obligations in their more simple forms are constituted, and those also by which they are transmitted. We next proceed to inquire into the nature of the instruments by which obligations are extinguished.

But it is first to be observed, that obligations may fail of effect, or cease to operate, by the non-existence or the expiration of conditions requisite to give them force. Thus, obligations granted in contemplation of a marriage cease, if the marriage does not take place. The obligation under a bond of relief is not incurred, if the debt is paid, and the principal debtor discharged. A delivered deed also, although it imports an immediate obligation, may be controlled by circumstances suspending the force of the obligation, as when the whole amount of a loan is not paid at delivering the bond, but the creditor gives to the debtor an acknowledgment, that although the bond bears the amount specified, yet only a smaller sum has been paid. Such a declaration effectually suspends the force of the obligation as regards the amount not paid, until payment is made, and, when that takes place, clear evidence of the payment should be preserved, both to counteract the effect of the previous declaration, and to prevent dispute in settling interest. These are examples of deeds failing to attain the character of obligations capable of immediate enforcement. We are now to treat of the extinction of obligations which have become completely effectual.

Mr. Erskine has explained various modes by which obligations may be extinguished. These are, (1.) *Specific performance*, as payment of the debt, or execution of the act, for which a party is bound. (2.) The creditor's bare consent, or voluntary act, as, when he is satisfied to discharge the obligation without receiving performance—which is called *Acceptilation*. (3.) *Compensation*. This takes place when two parties become mutually debtor and creditor to each other, which creates a *concursus debiti et crediti*, and the debts on both sides cease

CONDITIONS
SUSPENSIVE OF
OBLIGATIONS.

Inst. B. iii.
tit. 4.
MODES OF
EXTINCTION OF
OBLIGATIONS.
1. PERFORM-
ANCE.
2. ACCEPTILA-
TION.
3. COMPENSA-
TION.

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4. NOVATION,
AND DELEGA-
TION.

5. CONFUSION.

IMPLIED DIS-
CHARGE.PRESUMED
PAYMENT OF
RENTS AND OF
FACTOR'S
ACCOUNTS.

Inst. iii. 4, 10.

7 S. 548.

1 S. 39.

2 S. 594.

EXTINCTION OF
OBLIGATIONS
BY WRITTEN
INSTRUMENT.

to exist. (4.) *Novation* and *Delegation*. Novation is the discharge of an obligant by the acceptance of a new obligation from him, in such terms or circumstances as to liberate him and his co-obligants from the former obligation. Delegation is the changing of one debtor for another, by which the obligation by the original debtor is discharged. (5.) *Confusion*—which is the *concursus debiti et crediti* in the same person, as, when the granter of a bond obtains right to it by inheritance, upon which it is extinguished, the same person being both debtor and creditor. There is another species of discharge, effected by the mere operation of the law, viz., that founded upon a presumption of payment derived from the conduct of the parties. Of this one example is afforded in the case of yearly or termly payments, such as rents, feu-duties, interest, &c. Here, if the debtor has separate discharges granted at three consecutive terms, a presumption arises that all payments due at previous terms have been made. This rule is stated by Erskine, and it was applied in *Hunter v. Lord Kinnaird's Trustees*, 5th March 1829. This presumption is founded upon the reiterated discharges, and not upon the lapse of successive terms; and, therefore, two receipts including three or more termly payments do not raise the presumption. This implied discharge can only be elided by the debtor's writ or oath. Another case, in which the doctrine of presumed payment is admitted, is in a factor's accounts. If these are regularly rendered and acquiesced in, they cannot be opened up for the purpose of challenging the propriety of the disbursements after a lapse of years; *M'Arthur v. M'Arthur*, 30th May 1821. No lapse of time short of forty years establishes presumption of payment of bonds. In *Graham v. Veitch*, 18th December 1823, action was raised upon a bond on the last day of the thirty-ninth year from its date of payment; and, although there was evidence of the debt having been considered by all parties to have been paid, the Court would not admit parole evidence to control the deed, and subjected the granter's representative in payment.

While it is proper thus briefly to notice these different modes of extinction, the part of the subject which properly belongs to this Chair is the dissolution of obligations by written instrument, in the two first cases put by Mr. Erskine, viz., specific performance, and the consent of the creditor. At a former period it was the practice, upon performance of an obligation, to rest satisfied with the cancellation of the instrument instructing it. This is not to be relied upon, however, as an effectual discharge. In a bond for money, the fact of payment cannot be proved by parole evidence, and there is, therefore, no available proof of the payment, while, although the bond be destroyed, the tenor of it may be proved; and, however improbable such a thing may appear at the time, a change of circumstances may arise, producing effects not now anticipated.

The proper evidence of the payment and extinction of a bond is a formal writing or deed, which is called a **DISCHARGE**, the intention of which instrument is to dissolve the tie or bond created by the obligation. It is a general rule, that rights constituted by writing should be extinguished by writing; and Mr. Erskine says,—“The same solemnities that are requisite to a deed which creates an obligation are necessary in a written discharge of it.” This principle was applied in the case of *Grierson v. King*, 4th July 1781, where the discharge of a legacy of £20 was held invalid, not being holograph, the writer not being designed, and no witnesses being named or subscribing. The case of *Campbell v. Montgomery*, 30th May 1822, is given in Shaw’s Digest, as settling that a discharge does not require to be tested in terms of the Statute 1681; but the report of the case is too meagre to shew the grounds of the decision, and no practitioner could safely admit any laxity of practice upon such an authority.

The discharge is one of the simplest of our deeds, and any words which clearly express the payment and extinction of an obligation, which is distinctly referred to, will make an effectual discharge. In ordinary practice it contains seven clauses, viz :—

- (1.) The narrative, which recites the obligation to be discharged.
- (2.) The cause of granting.
- (3.) The discharging clause.
- (4.) The clause of warrandice.
- (5.) The clause of delivery of writs.
- (6.) The consent to registration; and
- (7.) The testing clause.

These clauses shall be commented upon in their order.

1. *The Narrative.* The deed commences with the name and designation of the granter—that is, the creditor. If he is the original creditor, it is unusual to have a discharge separate from the bond, as it may be quite short. Receipts or discharges indorsed upon bonds and other instruments, have been supposed to fall under one of the exemptions from stamp-duty. The exemption, however, appears by its terms to refer only to such receipts by the obligant in the deed for the consideration, as are often indorsed upon English deeds; and now that the penny stamp serves for the largest sum, it ought to be used in all discharges, even when indorsed upon the instrument of debt. In the Juridical Society’s Styles, there will be found the form of a discharge to be written on the back of the bond. A simple acknowledgment of payment, and discharge of the bond and sums it contains, will suffice. Upon the same page there is also given the form of a separate receipt, to be used, when, from any particular circumstance, a separate receipt is thought necessary. This receipt, and that on the back of the bond, refer to each other, in order to exclude the presumption of double payment. And, whenever a bond

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THE DIS-
CHARGE.

Inst. iii. 4, 9.

M. 17,054.

1 S. 446.

Vol. i. p. 389.

CLAUSES OF
THE DIS-
CHARGE.

NARRATIVE
CLAUSE.

DISCHARGE
INDORSED UPON
BOND.

Vol. ii. p. 365.

PART II.	is discharged by a separate deed, it is useful and prudent to take
CHAPTER III.	also an acknowledgment on the back of the bond, or to make an indorsement of the fact, with the date of such separate deed. But if
DISCHARGE IN FORM OF A SEPARATE DEED.	the bond has been recorded, there must be a separate discharge, because the bond is retained in the register. In this case the discharge should be recorded also, and a reference to the record of the discharge marked on the margin of the record of the bond. In discharges of inhibitions, there is generally an express provision for such a marking inserted. When the discharge is separate, if it is granted by the original creditor, it narrates the bond, and, if the granter be a different person from the original creditor, it sets forth his title. Thus, if he is an assignee, after narrating the bond, the deed bears, that the granter acquired right to it by assignation from the original creditor, and specifies the dates of the assignation and intimation. In like manner, if there has been more than one transmission, they should all be specified, so as to connect the right of the granter by an unbroken chain with that of the original creditor. If the discharge is granted by the executor of the creditor, he is described as executor nominate or decerned conform to the confirmed testament, specifying where it was expedite and its date. If the deed to be discharged be a bond secluding executors, then the title of the heir must be set forth, which will be his general service as heir of provision to the creditor. And so in other cases—as in the case of tutors and curators, trustees, or factors—the particular character, and the deed or judicial act conferring such character, must be set forth. With regard to
TITLE OF GRANTER OF DISCHARGE.	minors, it is to be observed, that a gratuitous discharge by a minor is invalid; <i>Lockhart v. Lockhart</i> , 25th July 1626. And when a minor has no curators, his debtor cannot be required to pay to him, because
DISCHARGE BY MINOR.	he cannot give an effectual discharge; <i>Hay v. Grant</i> , 22d February 1749. In this case the Court appointed a <i>curator bonis</i> , with power to receive and discharge. Upon the same principle, the Court again
M. 8958.	refused to ordain the debtor of a minor without curators to make
M. 8973.	payment, in the case of <i>Kirkman v. Pym</i> , 1st August 1782; and in
M. 8977.	the report of this case, there will be found stated from the Bench
DISCHARGE BY WRONG CREDITOR.	the distinction between payment of capital sums and payment of
Inst. iii. 4, 3.	interest and rents, the latter falling under the head of ordinary acts
	of administration necessary for the minor's support. If a debt is
	paid, and the discharge consequently granted by one who is after-
	wards ascertained not to be the party truly entitled to it, the dis-
	charge is not on that account necessarily void. The question of its
	validity will depend upon the <i>bona fides</i> of the debtor in making the
	payment, and whether he had sufficient probable grounds for believing
	that the party receiving the money was the true creditor. This doc-
	trine is stated, and authorities cited in support of it, by Mr. Erskine.
	But there must be probable grounds for the belief, and any appear-

ance of collusion will aid in reducing the discharge. So, in *Howes v. Goodlet Campbell*, 2d December 1758, payment having been made to a party, notwithstanding the reported existence in America of an heir-portioner entitled to half of the debt, the debtor was found liable in second payment of that heir's share, upon his appearance ten years afterwards. In making payment to any party on behalf of the creditor, care must be taken, either that a discharge by the creditor himself be obtained, or that it be granted by a party clearly entitled to receive the money and discharge it. Possession by a factor of his constituent's ground of debt does not imply power in the factor to discharge the principal sum, even though he has drawn the interest with the approval of his constituent; and, in the absence of written authority, nothing but repeated receipt of principal sums by a factor, homologated by the creditor, will invest him with implied authority to receive and discharge principal sums; *Duncan v. The River Clyde Trustees*, 24th January 1851, affirmed on appeal. In this case, the trustees having paid £200, due upon a promissory note, to a factor who failed to account therefor, were subjected in second payment to his constituent. It is, of course, essential, that the narrative be distinct, and the part of it which recites the obligation, ought to be as nearly as possible in the words of the bond or other deed. If diligence has been done upon the deed, that should be mentioned, and the particular steps of it specified in the narrative, or in a subjoined inventory, as the diligence must be discharged as well as the debt and obligation, and the writs of diligence delivered.

2. *The cause of granting.*—This clause states the manner in which the obligation has been extinguished. It is not essential to the validity of the deed, but it is highly expedient that the mode of extinction should be set forth, in order not only to preserve a clear record, but to determine the extent of the grantor's liability in warrandice, which, as we shall afterwards see, depends upon whether the consideration, in respect of which the discharge is granted, be onerous or gratuitous. The clause begins with the words "*And now seeing,*" which are important as being the *voces signatæ* for introducing the immediate cause or consideration, for which discharges and various other deeds are granted. The narrative clause begins with the word, "*Considering,*" and its various stages are indicated by the word "*That,*" or by the words "*And whereas,*" or, it may be, "*And further considering.*" But, when a party desires to ascertain the grounds or consideration for which a deed has been granted, he searches for the words, "*And now seeing.*" If it is a bond that is discharged upon payment, the clause proceeds to state that the debtor has made payment of the principal sum, and, if any interest is paid at the same time, the amount of that is specified, with the term from which it has accrued; and, if the interest due at prior terms has been formerly

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M. 1799.

TITLE TO
GRANT DIS-
CHARGE.

13 D. 518.

CAUSE OF
GRANTING
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GRANTING,
contd.

PAYMENT BY A
THIRD PARTY ON
ACCOUNT OF
THE DEBTOR.

M. 11528.

D. 231.

11 D. 254.

FALSEHOOD IN
THE NARRATIVE.

paid, that is also stated ; or, instead of acknowledging any portion of the interest in the discharge, it is not unusual to grant a separate receipt for the interest, and to insert in the discharge a general acknowledgment, that all interest due upon the debt has been paid and separately discharged. The clause concludes with the usual acknowledgment of receipt, renouncing all objections to the contrary. If the discharge is granted, not upon payment, but for love and affection, or other gratuitous consideration, that will be set forth. If there is partly payment, and partly a voluntary surrender of the remainder of the debt, or, if there is entire or partial compensation, or, if the discharge arises out of a transaction involving various considerations granted, or concessions made, by one party or by both—in any of these cases the more distinctly and explicitly the actual *res gestæ* are set forth, the better will the deed answer its purpose. When the debt is paid, not by the proper debtor, but by another on his account, then, if the party who actually makes the payment intends to take credit for it in accounting with the debtor, he must take care that the fact of the payment having been made by him is set forth in the acknowledgment ; for, in the absence of such a statement, the presumption of law is, that payment has been made by the debtor himself who is named in the discharge. Effect was given to this presumption in *Halyburton v. Cook*, and *Nisbet v. Johnston*, both decided on the 26th July 1711 ; in which cases credit was disallowed to a party for payments alleged to have been made by him on behalf of the true debtor, because the discharges which he produced bore the payment to have been made by the debtor himself. Where agents for the creditors in a heritable bond granted receipts to themselves as agents for the debtor, for payments of interest thereon debited to him in their books, and which receipts declared all concerned to be discharged, they were held to be precluded from afterwards obtaining an assignation of the security, so as to compete for the interest with other creditors of the debtor ; *Tod v. Dunlop*, 13th December 1838. But, where payment was made by another than the debtor, receipts granted by the creditor to his own agent, who had advanced the money, although expressing a discharge of the debtor, still, not being delivered to him, were held not to discharge him, the payment not having been made out of his funds ; and so the creditor's agent, who had made the advance, was entitled to receive an assignation ; *Wood v. The Northern Reversion Co.*, 20th December 1848. The principle of the latter decision is, that the existence of a receipt bearing that the debtor is discharged, does not discharge him, if not delivered.

The narrative must be true. The effect of a statement in any degree incorrect will depend upon the circumstances ; but, when a discharge is manifestly to the prejudice of the granter, falsehood, especially if accompanied with undue compulsion, such as may arise

from poverty, will be fatal to the deed. Of this we have a striking example in the case of *Ewen or Graham v. Magistrates of Montrose*, 17th November 1830, decided by the House of Lords reversing the decision of the Court of Session, 5th February 1828. Here an only daughter had valuable rights under her father's contract of marriage. She married against her father's consent; and, when in necessitous circumstances, and just about to embark with her husband for India, she executed along with him a post-nuptial contract of marriage, to which her father was a party, and by which, for a consideration totally inadequate, (viz an alleged payment of £315,) she discharged her rights under her father's contract of marriage, the value of which proved to be about £14,000. After the father's death she instituted a process of reduction of her post-nuptial contract, and also of a settlement executed by her father to her prejudice. The case was first tried upon the question, whether the terms used in the post-nuptial contract did or did not truly import a discharge of her rights under her father's contract of marriage. The Court of Session decided, that the contract did not import such a discharge, but this decision was reversed by the House of Lords, 28th June 1825. The case was then tried upon the ground of fraud, and the Court of Session found, that there was nothing in the case relevant to infer fraud; but this decision, also, was reversed by the House of Lords, and it is instructive to observe the grounds of the reversal, which are shortly these—the youth and pecuniary distress of the daughter and her husband at the time of the discharge, which was executed by them without the assistance of an agent—the inadequacy of the consideration—and the falsity of the narrative, which bore that the £315 was given by the father from regard to his daughter, whereas he strongly disliked her, and that one-half of the consideration money was instantly paid, the fact being that he had retained a large part of it in extinction of an alleged debt, and had only given his promissory-note for the balance of that half, while the remaining moiety was made payable only at his death. Upon these grounds the House of Lords reduced the deed containing the discharge. The consideration must not only be stated, but it is essential to the validity of the discharge, that it be actually implemented; and, when the thing undertaken to be done as the price of obtaining the discharge has confessedly not been implemented, the discharge is ineffectual; thus, in *Glass v. M'Intosh*, 12th May 1825, a discharge, granted in consideration of a composition for which bills were stated to have been given, was found not to bar the claim of a creditor who had subscribed, it being admitted that he had received no such bills. And to the same effect is the case of *Thomson v. Thomson*, 1st December 1829, where a debt was found still to be subsisting, notwithstanding a discharge by the creditor, that discharge having been executed upon the narrative that a bill

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4 Wil. & Sh.

App. 346.

FALSEHOOD IN
NARRATIVE OF
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CONSID.

2 S. 612.

1 Wil. & Sh.

App. 595.

6 S. 479.

CONSIDERATION
OF DISCHARGE
MUST BE IMPLE-
MENTED.

4 S. 1.

8 S. 156.

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had been granted, which it was admitted by the debtor had not been done. But when a discharge has been granted and possessed by the debtor during a period of years, those entitled to rely upon such discharge will not be rendered liable by alleging that the consideration for which the discharge was granted has never been realized. Thus, a term's rent having been discharged, it was attempted, eleven years after the date of the discharge, to subject a cautioner, upon the ground that payment had been made by a bank draft, which had been dishonoured. But the Court found that he was liberated by the discharge; *Duke of Buccleuch v. M'Turk*, 25th June 1845.

7 D. 927.

DISCHARGE
GRANTED UNDER
ERROR.

Essential error is a ground for reducing a discharge—that is, a fundamental mistake with respect to the substance of the right discharged; and, therefore, where an only child granted a discharge of her claim of legitim out of her father's estate under the impression that she had right only to one-half of the amount of legitim, whereas she was, in reality, entitled to the whole, the discharge was held insufficient to bar her claim to the full amount. This will be found in the first interlocutor of the Lord Ordinary in the case of *Ross v. Mackenzie*, 18th November 1842. A question of great difficulty has sometimes been agitated, viz. whether, by the Law of Scotland, a claim of restitution arises, where an over-payment has been made from error in law. Observations were made in the House of Lords in the cases of *Wilson & M'Lellan v. Sinclair*, 7th December 1830, and *Dixon v. Monkland Canal Company*, 17th September 1831, tending to hold it to be law in Scotland, that no action of *condictio indebiti* lies for payments made in pure error in point of law, each party being fully aware of the facts. This, however, has been held not to extend to the case of a party, who, having granted a general discharge upon payment of what turns out not to have been the full debt, afterwards sues for payment of the balance. The case of *Ross*, already cited, is an example of such an action being sustained, and the claim has again been sustained in *Dickson v. Halbert*, 17th February 1854, such being considered not to be a proper case of *condictio indebiti*.

5 D. 151.

4 Wil. & Sh.
App. 398.

5 Wil. & Sh.
App. 445.

16 D. 586.

DISCHARGING
CLAUSE.

3. *The Discharging Clause*.—The usual form is in these terms:—*"Therefore,"* (that is, because of the consideration just stated,) *"I have exonerated and discharged, and do hereby exoner, acquit, and simpliciter discharge"* the debtor, *"his heirs, executors, and successors, of the said principal sum,"* (specifying the amount,) *"with the whole interest due thereon, liquidate penalty, and termly failures, all contained in the bond above narrated; and of the said bond itself, and the whole clauses, obligations, tenor, and contents of the same, with all action, diligence, and execution, which have followed, or are competent to follow thereupon."*

i. p. 217.

Mr. Ross holds, that the proper order of this clause is to discharge—first, the bond—then, the money, and, lastly, the diligence. In the

style commonly used, the money is discharged first, and then the bond. Mr. Ross prefers the former arrangement, because, while the assignation is, as he says, *venditio nominis*—that is, a conveyance of the writ or title of the debt, the discharge ought in like manner to be *liberatio nominis*, and, therefore, the instrument should be the leading subject of the discharge—the fact of there being an instrument being the cause of a discharge being required, for no written discharge would be necessary, if there were no written evidence of the debt. This is ingenious, but not very important, and the ordinary style recommends itself by this consideration, that it discharges first the money, which is the essential thing, and then the bond, which is only the evidence of the real transaction. The word “*discharge*” is used in England in judicial proceedings, to express the release of a party from confinement, upon his doing what is legally required. In our practice, it expresses the act of setting free or loosing from the tie of an obligation. “*Acquit*” is derived in Jacob’s Law Dictionary, through the medium of the French *acquitter*, from the Latin *acquietare*; and in England one of its primary significations accords well with the derivation, since it implies freedom from entries and molestations of a superior lord for services out of lands—that is, according to an expression commonly used in England, “quiet possession.” By a natural transition the word came to import freedom from trouble on other grounds; and one discharged upon a trial for felony was said to be *acquietatus de feloniam*. The word “acquittance” is used in England to signify a discharge in writing of a sum of money. The instrument, by which rights relating to lands, and some others, are discharged, is called by them a “release.” The word “*acquit*” in our discharge expresses, what naturally flows from its etymology, to free from further trouble or demand. “*Exoner*,” as its origin plainly denotes, means to disburden of the claim.

When the debt discharged is separate and distinct, and rests upon a bond, the extent of the discharge is clearly defined by the reference of the discharging clause to the narrative. When the document of debt is not thus simple, the rule ought carefully to be observed, to make the words of the discharge exactly commensurate with those of the narrative, and such as distinctly to define the extent of the discharge. Where there have been various transactions between the same parties, if the discharge is intended to effect an entire clearance between them, so that neither shall any longer be debtor or creditor of the other, this will be easily accomplished by the use of comprehensive words; and, in order to exclude all room for after doubt or challenge, the intention to make a total discharge of all claims *hinc inde* should be set forth in the narrative, as a foundation for the absolute terms used in this clause. Again, when it is not

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GENERAL
AND SPECIAL
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cont'd.

intended that the discharge shall operate as an entire extinction of claims between the granter and receiver, but that, while one or more debts are extinguished, others shall be kept in force, then the greatest caution must be used to make the extent of the discharge clearly appear, either by defining distinctly the debts to which the discharge applies, and making a general reservation of all other claims, or by an express reservation of the debts which are not discharged. The necessity of a careful observance of these rules is made evident by referring to the legal principles applied in the construction of discharges containing general and special clauses. When a particular debt is discharged, and a general discharging clause is added, the general discharge is held to include all debts *ejusdem speciei*—that is, of the same kind with the particular debt discharged. Thus, in *Talbot v. Guydet*, 29th June 1705, a discharge of a bond for £50 had subjoined to it a general clause discharging all claims and demands, and it was, therefore, held to discharge also a ticket for £400, that being a debt of the same kind. But the effect of the general clause is limited to debts of the same kind; and so, in *Dalgarno v. Laird of Tolquhoun*, 19th November 1680, a general discharge, which, upon a narrative of intromission with girnells and farms, discharged all debts, sums of money, bonds, obligations, &c. “for whatsoever cause,” was found not to include an obligation by the debtor to dispose lands, or procure dispositions thereof. On the same principle, a receipt in general terms for all the claims of a party as outgoing tenant, annexed to a detailed account of items, is held to be a discharge of these items only, unless it contain express terms giving it a wider application; *Marquis of Tweeddale v. Hume*, 26th May 1848. Again, when the deed is a discharge generally of all claims, it is not held to include such obligations as the granter cannot be presumed to have had in view, when the discharge was granted. So, an agreement to grant a discharge in full upon payment of £210, when an additional claim of £200 was not in view, was held not to be taxative, and the creditor, therefore, entitled to recover the £200 also; *Moore’s Trustees v. Carmichael*, 28th June 1836. Upon the same principle, a general discharge of all claims does not include the granter’s claim to be relieved from a cautionary obligation current at the time; *Oliphant v. Newton*, March 1682. The same was decided by the House of Lords in *M’Taggart v. Jeffrey*, 24th November 1830, reversing the decision in the Court of Session. Nor will a general discharge by a creditor import the discharge of a debt, which he has previously assigned, although the assignation is not completed by intimation at the date of the discharge; *Logan v. Affleck*, 14th February 1736. These cases make it sufficiently evident, how important it is to exclude all risk of doubt by making the discharge express clearly and without ambiguity, what debts it does extinguish, and, if

Ersk. Inst. iii.
4, 9.

M. 5027.

M. 5030.

10 D. 1053.

14 S. 1026.

M. 5035.

4 Wil. & Sh.
App. 361.
6 S. 641.

M. 5041.

necessary, what debts it leaves undischarged. There is no room, however, to restrict the import of a general discharge, when such restriction is inconsistent with the design necessarily entertained in granting it. So, the discharge of an insolvent debtor upon payment of a composition, though referring *in terminis* to debts due at a specified date, was held to include a bill held by an acceding creditor, although not falling due till a later date, the intention being to grant a universal discharge with a view to the debtor's reinstatement in business; *The British Linen Company v. Espin*, 6th June 1849. Upon 11 D. 1104. the same principle, the discharge of a company implies the discharge of the individual partners, where the object of discharging the company would have been defeated by retaining the claim against the individual partner; *Sceales v. Wighton*, 5th March 1852. 14 D. 628.

When a party is liable for the debt in more than one character, he should require to be discharged expressly in every capacity importing his liability. In the case of *Melliss v. The Royal Bank*, 22d June 1815, the partners of a discharged company were held to be still bound individually, not having been discharged as individuals. And in *Lindsay v. Clelland*, 20th January 1844, the discharge under a 6 D. 412. sequestration of John Lindsay, as sole partner of John Lindsay and Co., and as an individual, was found not to protect him from imprisonment for a debt contracted under the firm of John Lindsay and Son. In construing the terms of a discharge, the Court will not extend it beyond its obvious design. The interest of a sum being destined to a mother, and the capital to her children at her death, the principal sum was, with the consent of all parties, paid to the mother, and a discharge granted by her and the children to the trustees. It was argued, that the capital was thus made to belong to the mother; but the Court held, that, while the discharge was good to the trustees, in whose favour it was granted, it did not imply a relinquishment by the children of their claim in favour of their mother to the capital; *Halbert v. Dickson*, 13th February 1851. Upon the same principle of restricting the effect of a discharge to its obvious design, the acceptance of £2000 of tocher as in full of a child's legal claims was held not to import the discharge of £1350, due by the father at the time upon bonds of provision granted by the mother, and made a burden upon lands conveyed by her to the father; *Gordon v. Glendonwyn*, 13 S. 882. 9th June 1835.

4. *Warrandice*.—The warrandice of a discharge is absolute, unless it be granted gratuitously, in which event it is from fact and deed; and, according to the general rule, warrandice of these degrees will be implied, when not expressed. It is advantageous to have express warrandice, to exclude dispute, and to give immediate recourse, in the event of it being necessary to call upon the granter to make good the obligation. WARRANDICE OF DISCHARGE.

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5. *Clause of delivery of writs.*—This clause is inserted for the security of the creditor, in the event of any subsequent demand, on the allegation of the writs not having been delivered. It is also advantageous for the debtor, to get possession, not only of the bond or other obligation, but of all steps of diligence, and other relative writings also, which might lead to trouble afterwards, if found in the creditor's repositories. Should the obligation or other important document have been lost, the fact should be stated, and an obligation taken to deliver it, and to indemnify against all loss and damage which may result from the want or subsequent appearance of it.

REGISTRATION
OF DISCHARGES.

6. *Clause of Registration.*—According to the ordinary style, this is both for preservation and for execution. It is appropriate to the nature of the deed, that it should be recorded for preservation. The object of providing registration for execution, is to give summary recourse against the granter for implement of his obligation of warranty, in the event of the debtor being molested for payment. It is properly remarked in the Juridical Styles, however, that an action will generally be requisite to ascertain the fact, whether the warranty has been incurred.

CHAPTER IV.

THE WRITS BY WHICH THE PERFORMANCE OF OBLIGATIONS IS ENFORCED—
HORNING, CAPTION, POINDING, ARRESTMENT.

IN pursuing the general plan announced at the beginning, after disposing of the preliminary points and considerations applicable to all deeds,—which formed the subject of the first part,—we have under the second part examined (1.) the instruments by which personal rights are constituted,—(2.) those by which they are transmitted,—and (3.) those by which they are extinguished upon voluntary performance, or by the spontaneous act of the creditor. We now enter upon the fourth head of the second part, in which we are to ascertain, by what writs performance of obligation, when it cannot be obtained voluntarily, may be enforced. We are, therefore, about to consider the redress accorded by the law to the holder of an obligation, when the granter refuses or fails to fulfil it. We have not time to examine the history of execution to enforce payment or performance against the property and person of a debtor. It will be found treated by Lord KAMES in his tenth, eleventh, and twelfth Historical Law Tracts; and Mr. Ross has amassed, though in a form not perfectly lucid, much information from recondite sources in his treatise upon the history of personal diligence, as well as in the subsequent treatises upon the several steps of diligence, in the latter half of the first volume of his Lectures. I shall attempt nothing more than to gather up the points of leading importance, and which, though belonging to forms of procedure no longer observed, require to be known, in order to obtain a complete understanding of the modes of execution which now subsist.

The earliest accessible records exhibit the operation of the principle, that, when a debtor or the granter of an obligation fails in the specific performance, (*i. e.*, fails to pay the sum due, or to do the thing he has become bound to do,) he is liable, both in his person and his means, to satisfy the creditor. His property is attachable, that payment may be made or secured out of it; and his person also has generally been held subject to the disposal of the creditor, either as a

HISTORY OF
EXECUTION FOR
DEBT.

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HISTORY OF
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Tracts, 332.

means of obtaining performance, whether directly or indirectly, or as a penal consequence of the failure. The tenderness to debtors enjoined in the Mosaic Law, and the provisions which it contained for their periodical release, were peculiar to the Jewish economy, and the earnestness with which these points were enforced, while it forms, from the marvellous benevolence of the institution, one of the internal evidences of the Divine origin of that dispensation, is an indication also of the severity of the practices from which these rules were designed to wean and separate those upon whom they were enjoined. Among the ancient Egyptians, again, we are informed, that payment was taken out of the debtor's goods; but, upon grounds of public policy, they did not permit the body of the debtor to be attached for a private debt, because the service he owed to the public in peace and war would thus have been withdrawn. For the same reason, the laws of Solon did not permit imprisonment for debt; while other Grecian legislators were blamed, because, although they did not allow implements of husbandry to be attached, (a practice followed to a certain extent in our own law,) they held the bodies of those who used such implements liable to incarceration for debt. In these instances of the exemption of the debtor's body from restraint by his creditor, the right of recourse against the person is regarded, not as without a foundation, but as yielding to public claims of greater cogency. Among the Romans, whatever doubts may exist with regard to the laws of the Twelve Tables, whether it was the body of the debtor or his corporeal moveables that creditors were entitled to sever and divide, there is no doubt that the creditor could enslave and sell his debtor, whose work or sufferings had no effect in diminishing his debt, while the law also condemned children to slavery for payment of their father's debts; and that this continued until the *lamentabile remedium* of the *cessio bonorum* was introduced—an indulgence liberating the person of the debtor upon the entire surrender of his property. We read, that, among the Gauls and Germans, the consequence to a debtor of his inability to pay was the slavery of his person; and, from what remains of the laws of the Anglo-Saxons, it is ascertained that they gave to a creditor power to seize his debtor's property, and also to imprison his person, and hold him in captivity until satisfaction should be received.

HISTORY OF
EXECUTION FOR
DEBT IN SCOT-
LAND.

The most striking feature in the early history of execution for debt in Scotland, is the power exercised in that matter by the ecclesiastical tribunals. As the highest condition of human society which can be conceived, is that, in which truth is universally known and viewed by all in the same light, and men's conduct regulated by the highest of all laws,—those of inspiration,—so it cannot be wondered at, that, while the Visible Church held an undivided influence, she should have aimed at the direction of men in all their relations and

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HISTORY OF
EXECUTION FOR
DEBT IN SCOT-
LAND, *contd.*

pursuits, founding this claim to a pervading control upon the Divine injunction, in case of a brother disregarding the complaint of a trespass, to "tell it to the Church," although the context contemplates no power in the Church but that which is of a spiritual nature. Accordingly, the Church not only claimed, but obtained, and before the Reformation exercised, a wide and powerful jurisdiction in civil matters; nor did the elements of resistance to such an aggression exist. She was the depositary of learning, and of the learned arts. The Lawyers and Notaries were Churchmen, and, amongst other practices, they introduced into the contracts which they prepared an oath of performance, so that, an oath being a matter of spiritual censure, the way was paved for carrying disputes touching the performance of the contract into the Ecclesiastical Court. The judgment of the bishop, it is true, could not be directly enforced by every species of civil pains or forfeiture, but the ecclesiastical decree was in itself sufficiently awful, since, by the sentence of excommunication, pronounced after disregard of three orders issuing from the Bishop's Court, the debtor was excluded from the sacraments, and cut off from Christian society, every one being discharged from holding intercourse with him, or selling to him the necessaries of life. And, although in the earlier periods the Church could not herself punish offenders in their person, yet she could so direct her spiritual authority as to constrain the secular Judges to inflict civil penalties upon those offenders, as long as they continued under excommunication. But the Church was not always content with indirect modes of compulsion. By the Anglo-Saxon institutions, the jurisdictions of the Bishop and Sheriff appear to have been co-ordinate, and their sentences enforced by mutual respect and aid. William of Normandy altered this, and assigned distinct jurisdictions to the spiritual and secular powers. But the churchmen still struggled to direct the current of business into the Ecclesiastical Court; and in Scotland they succeeded to a large extent, chiefly by inducing parties to confer a prorogated jurisdiction—*i. e.*, to consent that their cases should be judged in the Church Court. It appears also, from our most ancient records, that the Church had from an early period the power of imprisonment. See statute of Robert III., *anno* 1400. The unfitting relation which the Church of Rome thus assumed towards the people—the unsuitableness of her high censures to the nature of civil offences—and the inconsiderate frequency and facility with which her anathemas were issued—are reasonably reckoned among the causes of her fall. The sanctity of an oath and the dread of excommunication evaporated, when the one was lightly undertaken, and the other, being issued for an inadequate cause, necessarily proved impotent in its effects. Accordingly, in the dawn of the Reformation, and with its growing light, the authority of the Church, and its judgments in civil matters, exhibited a

Thomson's
Acts, i. p. 214.

PART II. progressive and accelerating increase of that decay, to which a want
CHAPTER IV. of respect had already given birth ; and the tenacity with which her
 powers were grasped was at once an evidence that the ecclesiastical
 power was enfeebled, and a presage of its approaching dissolution.
 Until this period, Mr. Ross observes, that there was no apparent pro-
 vision for imprisoning debtors for non-payment, unless the debts had
 been constituted by the Ecclesiastical Judges, by whom, accordingly,
 it seems that nearly the whole civil business had been engrossed,
 leaving the criminal business alone to the Civil Judges.

While the authority of the Church in civil matters disappeared with
 the Reformation, it appears to have been felt as too sudden a change,
 when, at the same time, the aid of the magistrate was withdrawn in
 the enforcement of ecclesiastical censures ; for, by the Statute 1572,
 1572, c. 53. cap. 53, the civil penalties of rebellion, which inferred forfeiture of
 both personal property and the liferent of heritable property, as well
 as imprisonment of the person, were denounced against those who re-
 mained forty days under excommunication of the Reformed Church.
 But the last vestiges of reciprocal interference or aid between the
 10 Anne, c. 7. Ecclesiastical and Civil Judicatories were removed by the 10 Anne,
 cap. 7, (1711,) of which the tenth section declares, that no civil pain,
 forfeiture, or disability, shall be incurred by excommunication, and
 discharges civil magistrates from compelling excommunicated persons
 to appear or obey. A subject so interesting in the ancient history of
 the enforcement of obligations could scarcely have been passed with-
 out notice ; but it is unnecessary to dwell longer upon it, since the
 Ecclesiastical authority in civil matters has now been so long oblite-
 rated. We proceed, therefore, to trace briefly the origin and progress
 of civil execution for debt.

**HISTORY OF
 EXECUTION FOR
 DEBT, cont'd.**

**MODIFICATIONS
 INTRODUCED BY
 FEUDAL SYSTEM.**

Although, after the Norman invasion, imprisonment for debt was
 not practically abolished, the principles of the feudal system led to a
 very singular modification of the process, by which the incarceration
 of a debtor was accomplished. The great object and pervading fea-
 ture of the feudal customs consisted in the personal duty and service
 of the vassal to his superior. The relation of duty by the vassal and
 protection by the superior constituted the bond by which the ele-
 ments of society were held together, and upon which its coherence
 and security rested. The feudal obligation, being thus an essential
 condition of the general welfare, was regarded, theoretically at least,
 as a higher consideration than the claims of private justice, and cre-
 ditors, therefore, were not permitted to impose restraints upon the
 person of their debtors, since they could not do so without interfering
 with the superior's right to the vassal's service ; and thus it became
 a rule in the ancient laws both of Scotland and England, that no
 creditor could attach the person of his debtor. But, whatever degree
 of truth may have belonged to that maxim in the earliest period of

the feudal system, it came eventually to be accurate only in a modified sense ; for, although the subsistence of a debt did not form the avowed ground upon which alone incarceration could follow, it afforded the basis upon which reasons relevant in law to infer imprisonment could be reared. The circuitous process which conducted to this result was also founded upon feudal principles. The right of the feudal superior prevailed, as we have seen, over that of the private creditor ; but, on the other hand, the superior's claim was forced to yield, when brought into competition with a higher feudal power. That power resided in the Sovereign, the Lord Paramount. The Crown is the fountain of justice ; and when, upon complaint by the creditor, briefs had been directed to the King's Judges to try the claim, and it was ascertained to be just, then the duty of submission to the Sovereign, pronouncing through the voice of his Court his award, and ordaining performance, prevailed over the rights of the lesser, though more immediate, superior ; and thus the debtor's obligation of obedience to the Lord Paramount secured to the creditor that recourse against his person, which the claims of the immediate superior would have denied. In England, too, as we learn from Blackstone, "upon feudal principles " the person of a feudatory was not liable to be attached for injuries " merely civil, lest thereby his lord should be deprived of his personal services ;" and there the difficulty was obviated by the singular expedient of charging a trespass by citing the defendant to shew, *quare clausum fregit*—for breaking the plaintiff's close *vi et armis*—that being an offence which subjected the defendant's person to arrest ; and, after the action was commenced upon this foundation, the plaintiff, by connivance of the Court, might go on to prosecute for the real cause of complaint. Upon making the complaint the plaintiff was entitled to a writ against the defendant's person, called *capias ad respondendum*, which forced him to appear and find bail—a proceeding to which there was a precise parallel in the ancient forms of civil process in Scotland. The writ granted in execution in England was termed *capias ad satisfaciendum*. The security afforded by the feudal principles to the debtor's person was thus obviated, both in England and Scotland, by the aid of legal fictions—in the former country, by the awkward expedient of averring a trespass which had never been committed, and in Scotland by the equally imaginary imputation of rebellion, founded upon alleged disobedience to the Sovereign's command that the debtor should pay his debt, although no inquiry or distinction was made whether the failure to pay proceeded from wilfulness or from inability. It is not then to be wondered at, that, as the slave considers theft from his owner a less heinous offence than from a stranger, so the criminal character attached by the excited imagination of the law to the non-payment of debts was distinguished from the real crime of rebellion by the

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CHAPTER IV.
HISTORY OF
EXECUTION FOR
DEBT, CONTD.
CIVIL REBEL-
LION.

PART II.
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modified appellation of *civil* rebellion. The knowledge of this source of the law of imprisonment for debt is necessary in order to understand clearly the import of certain rules and forms which still subsist in the enforcement of obligations.

Our limits forbid us from pursuing further the early history of execution for civil debt. Those who wish to study it in detail will find full information in Mr. Ross's Lectures. It is the more difficult to devote adequate space to such inquiries, since, in addition to the long array of obsolete forms exhibited by Mr. Ross, we have now to class the writs of execution which prevailed when he wrote, as practically exploded. Although they are in disuse, still they must be explained, because not only are they still legally competent, but the new forms which now prevail cannot be thoroughly understood without an acquaintance with those for which they have been substituted.

OBJECT OF EXECUTION FOR DEBT.

In proceeding, then, to explain the forms of execution for debt, we have first to remark generally that such execution has two objects, viz. (1.) to compel the debtor to perform his obligation; and (2.) in default of payment by him, to recover it from his property. When a party has granted and incurred various obligations and liabilities, the creditors, if they use no steps of execution or, as it is called, DILIGENCE, are ranked *pari passu* upon the debtor's funds—i.e., they get equal shares in proportion to their claims, if there be not enough to pay all. Formerly the widow, upon grounds of compassion, was preferred for the provisions in her contract of marriage, but that rule has now been long altered, and the relict cannot claim in preference to onerous creditors; *Lindsay's Creditors competing*, 24th June 1714.

RANKING OF CREDITORS *pari passu*.

M. 3204.

PREFERENCE BY PRIORITY OF DILIGENCE.

iv. 41, 1.

No preference in moveable obligations attaches to priority of date in the contraction of the debt, or in the deed containing it. The preference (modified within certain limits in cases of bankruptcy) is granted according to priority in the use of diligence. The compulsors of the law are called diligences, because, according to Stair, they excuse the users from negligence, "*vigilantibus non dormientibus jura subveniunt*," which is founded on that great interest to have "ten pleas to an end." Mr. Ross derives it from the French Law, in which "diligence" means pursuit. Decrees before execution are called EXECUTORIALS—after execution, DILIGENCE, which term includes both the warrant and service. Diligence, then, is the legal procedure by which a creditor strives to obtain performance of his debtor's obligation; and it is directed either against his debtor's person by apprehension and imprisonment, or against his debtor's property. In the latter case, the diligence is either preventive, in securing the property from use or transference, or it is in direct execution, in order to transfer the property to the creditor himself in satisfaction of his claim. Again, diligence is divided into *real*, by which the debtor's heritable

property is attached, and *personal*—that is, diligence directed against his body or his moveable estate. PART II.

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A creditor cannot do diligence of his own authority. Attachment of the person or property is too serious an interference with the liberty of the lieges to be permitted upon any authority not sanctioned by the social compact, which in this country has conferred that power upon the Crown acting through the Courts of Justice. The sentence of a Judge is, therefore, a preliminary to diligence. Upon the obligation contained in deeds, we have seen that the decree of a Court can be procured at once by means of the consent to registration,* which, by providing the appearance of a procurator for the obligant, gives to the sentence the same force, as if it were a judgment pronounced *in foro*. The decree either contains warrant for execution, or it forms the ground upon which a warrant can be obtained. DILIGENCE
MUST PROCEED
ON JUDICIAL
AUTHORITY.

The first thing to be looked to, then, in recording a deed for execution is, that it be done in the books of a Court possessing jurisdiction over the debtor. The nature of an extracted deed as a sentence *in foro* is distinctly shewn by this, that, if the registration be made in the books of a Court to whose jurisdiction the obligant is not subject, the extract has no authority as a ground of diligence against him. Registration in the Books of Council and Session affords, of course, effectual execution against a party in any part of Scotland, all being subject to the authority of the Supreme Court. But, when it is intended to proceed by registration in the books of an Inferior Court, it is indispensable, that it be a Court having jurisdiction over the debtor. This is clearly shewn by the case of *Campbell v. Macdonell*, DECREE OF
REGISTRATION. 5 S. 412. 22d February 1827. Here a bill was drawn by a party living at Fort-William, but who afterwards removed to Ayrshire, where he was resident at the term of payment. The protest of the bill having been registered in the Sheriff-court books of Inverness, where it was payable, that was found not to afford a warrant for charging the drawer in Ayrshire; and the charge was suspended upon the same principle in *M'Ghie v. Henderson*, 14th December 1827, in which case the Sheriff- 6 S. 248. clerk of one ward of Lanarkshire having signed a precept in another ward, of which he was not clerk, it was held to be inept. By the provisions of the recent Personal Diligence Act, as we shall presently

* All bonds or obligations granted to Her Majesty, in the form heretofore in use in the Court of Exchequer, shall be deemed probative documents, and have the like privileges, operation, and effect, as if duly executed and attested according to the Law of Scotland; and, though they contain no clause of registration, they shall be capable of registration in the Books of Council and Session, or other Judges' books competent, and to have a decree interponed thereto, and to be extracted with a view to execution, as if they contained a formal clause of registration. When they stipulate for a penal sum to be paid in the event of failure to pay a smaller sum conditioned to be paid, diligence and execution shall proceed only for payment of such smaller sum, with interest and expenses due thereon; 19 & 20 Vict. cap. 56, (Court of Exchequer Act,) § 38.

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see, the extracts of registered deeds now contain not only a decree for performance of their obligations, but a warrant likewise for execution. That statute, however, still leaves it competent for a party to proceed according to the previous method, and although that will only be done under rare and peculiar circumstances, yet it is necessary for the practitioner to understand these forms, both in case he may be called upon to use them, and also in order that he may have a more perfect acquaintance with those now practised.

1. *Horning*.—The first step is to demand implement in legal form. This is done under the authority of the Sovereign by the legal officers, viz, messengers-at-arms, who, having in this respect succeeded to duties formerly discharged by the sheriffs, are called sheriffs in that part, which implies merely that they have, in the matter of the diligence, the same power of execution which the sheriff formerly exercised. It appears that at one time our summonses, like the English subpœna, could be served by any one, but that never was the case with respect to hornings, because none but an officer of the Sovereign could denounce rebellion. The legal demand is called a charge, which was formerly given upon the warrant contained in a writ called Letters of Four Forms. Examples of this writ are given in the appendix to Lord KAMES' Historical Law Tracts. It directed four charges at successive intervals of three days each. It is needless to examine this writ. Its inconvenience was obviated by the Act of Sederunt, 23d November 1613, which substituted Letters of Horning upon a single charge. The origin of the name of the latter writ will appear presently. The instrument thus substituted for the letters of four forms is of the nature of a letter, addressed by the Sovereign to messengers-at-arms as sheriffs in that part.* No names of messengers are inserted, but a blank is left, and they are addressed jointly and severally, which implies authority to any one messenger-at-arms. Originally the authority was granted to one officer by name, and, when resistance was apprehended, as was not uncommon in a barbarous age, several were named with power to act together or singly. The address concludes with the word "*greeting*," which corresponds precisely to the *salutem* of the Latin epistle. The ground of debt is particularly narrated, the creditor being styled "*Our Lovite*"—that is, our beloved subject, as expressive of the Sovereign's regard and protection. Where a nobleman is the party, he is "*Our trusty and well-beloved cousin*." When the ground of debt is a bond, of course the obligation to pay, with the sums, principal, interest, and penalty, must be accurately recited, and, to shew the warrant for diligence, it is mentioned that the bond has been recorded, and a decree interponed. When there have been partial payments, these must be specified, because an authority to charge for a larger amount than is actually due would affect

LETTERS OF
FOUR FORMS.

LETTERS OF
HORNING.

* See Note, p. 282, *infra*.

the validity of the writ ; *M'Martin v. Forbes*, 12th November 1824. The necessity of accuracy in reciting the ground of debt is shewn by *Brown v. Blaikie*, 1st February 1849, where the date of payment of the debt being partly written upon an erasure, that circumstance was held to be fatal to the validity of the diligence. Then follows the part of the letters containing what is technically called the Will—formerly, the Command. It runs thus : “ *Our will is herefore, and We charge you, that on sight hereof ye pass, and in Our name and authority command and charge the said,*” &c. Here the debtor is named. If there be a principal debtor and a cautioner, it must “ *Charge the said A as principal, and the said B, as cautioner for him, but that SUBSIDIARIE, and after discussion of the said principal, and as proper cautioner only.*” If there are various obligants bound jointly and severally, then the authority is to charge the said “ *A. B. & C., jointly and severally.*” The charge is to be given to the debtors “ *personally or at their respective dwelling-places,*” in conformity with the rules by which the execution is regulated, and which still subsist, “ *to make payment to our said lovite of the said principal sum.*” The sum is specified with the penalty and interest, and the writ is made prospective, so as to warrant charges for the interest, “ *to fall due at future terms, such terms being always first come and bygone.*” The charge for the penalty may be made specifically for the actual expenses incurred. If these are disputed, the amount will be settled by the Court upon a report of the auditor in a suspension of the charge ; *Hynd and Loudon v. Soot*, 30th May 1826. The rate and amount of interest must be accurately stated ; and payments to account must be deducted here also.

The period of the charge is—“ *within six days next after he is charged by you thereto,*” if there be a consent to the short charge, or if the law authorize it, as in the case of bills and promissory notes. If there be no such consent, then the duration of the charge was, by immemorial and established practice, fifteen days. This is specified in the Act of Sederunt, 23d November 1613, with a provision for twenty-one days where the debtor lived north of the river Dee ; but the latter regulation has long been in desuetude. Now, by the Court of Session Act, 13 & 14 Vict. cap. 36, it is provided in sect. 21, that all summonses before the Court of Session may proceed on fourteen days’ warning, where the defender is within Scotland, unless in Orkney or Shetland ; and twenty-one days warning where he is in Orkney or Shetland, or furth of Scotland ; and that such shorter *induciæ* shall also be competent and sufficient in respect to all other letters passing the Signet bearing a citation, charge, publication, or service against persons within or furth of Scotland respectively ; and in respect to all edictal charges upon decrees and registered protests. Where shorter *induciæ* were sufficient at the passing of this Act, (1850,) it provides,

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§ S. 275.
11 D. 474.
LETTERS OF
HORNING, *contd.*

Induciæ OF
CHARGE ON
LETTERS OF
HORNING.

Spottiswoode's
Prac. p. 150.

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that they shall continue to be sufficient. By the Act 1685, cap. 43, the inhabitants of Orkney and Zetland were entitled to *induciæ* of forty days, unless they had consented to a shorter time; by the Court of Session Act, the period is, as we have just seen, limited to twenty-one days. When the party is out of Scotland, he was formerly charged upon *induciæ* of sixty days, and that, whether he had consented to a shorter charge or not, The Court of Session Act has also limited this period to twenty-one days. These are the *induciæ* common in practice. There are others in particular classes of writs, viz., on decrees of the Teind Court, ten days; upon Exchequer warrants, twenty days;* and upon hornings at the instance of an adjudger against the superior *nominatim*, formerly twenty-one, now fourteen days, the *induciæ* against superiors generally being now twenty-one days in place of sixty. No case seems to have occurred of a charge consented to upon shorter *induciæ* than six days; and Lord MEADOWBANK, in the case of *Forrester v. Walker*, 27th June 1815, indicates an opinion, that the Court would have difficulty in sustaining such an innovation.

Jur. Styles, iii.
694, 695.

F. C.

PENALTY OF
DISOBEYING
CHARGE.

We have next the penalty of disobedience to the charge:—"Under the pain of rebellion and putting him to the horn, wherein, if he fail, the said space being elapsed, that immediately thereafter ye denounce him Our rebel, put him to the horn, and use the whole order against him prescribed by law." The origin of the denunciation of rebellion in civil matters has already been pointed out. The direction to "put him to the horn," refers to the manner of executing the denunciation, which will be explained presently. It is to this ceremony that the letters owe their name. The words, "the whole order against him prescribed by law," refer to the steps subsequent to denunciation, viz., registration of the horning and execution, which is still practised when this mode of diligence is used, and other steps which are now obsolete, viz., publishing the rebel's name at the market cross of the sheriffdom, and giving notice to the Treasury to inventory and seize his moveable goods fallen to the Crown by reason of rebellion, for which the old form contained an express direction, viz., "to escheat and bring in all their moveable goods and gear to Our use, for their contempt."

LETTERS OF
HORNING AND
POINDING.

The portion of the writ which we have examined, constitutes the horning, which is the diligence against the person, and the foundation for letters of caption, which form the warrant of imprisonment. When it is intended to use the writ for attaching the debtor's property by arrestment or poinding, a warrant to that effect is inserted, which we shall afterwards examine, and then the writ is called letters of horn-

* Under Schedule G of the Court of Exchequer Act, 19 & 20 Vict. c. 56, which comes into operation upon 12th November 1856, the warrant to be subjoined to extracts of Exchequer decrees in favour of the Crown authorizes a charge of six days.

ing and poinding. At present, we confine our examination to the horning as affecting the person.

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CHAPTER IV.

Next we have the words of style, commencing with an appeal to the highest warrant for such measures:—"According to justice, as ye will answer to Us thereupon, which to do We commit to you and each of you full power by these Our letters, delivering them by you duly executed and indorsed again to the bearer." The latter part of this clause refers to the re-delivery of the writ by the messenger to the bearer—that is, the creditor, after being executed and indorsed—that is, having the execution written on the back. "Given under Our Signet at Edinburgh, the day of , in the year of Our reign." The date of Signet letters is the date of their warrant. When, therefore, that warrant is a registered deed or protest, the date of the letters is the date of the extract, which is the date of the decree of registration; and, in this case, as descriptive of the warrant, the horning concludes with the Latin words—"Per Decretum Dominorum Concilii." Letters may be issued from the Signet, however, to authorize diligence upon the decrees of Inferior Courts—a proceeding which became necessary, whenever the party to be charged was *extra territorium* of the Inferior Jurisdiction. In order to this, it was formerly necessary to institute an action, and to obtain a decree of the Supreme Court, which, because it was to the same effect as that of the subordinate Judge, was called a *decree conform*. This was afterwards dispensed with, and warrant given, as a matter of course, upon production of the Inferior Judge's decree with a petition, called a bill, praying for letters of horning, &c., the clerk to the bills writing upon the back of it "FIAT UT PETITUR," (an expression traced by Mr. Ross to the Roman Chancery,) "because the Lords have seen the precept"—i.e. the decree of the sheriff or magistrates. The *fiat* bore the date upon which it was granted, and as it formed the warrant for issuing the letters, the date of the *fiat* was the date of the letters. A bill was necessary also, where the horning was to be at the instance of an assignee, and then the *fiat* was granted, "because the Lords have seen the registered bond and assignation above mentioned;" and, in such cases, the warrant being the deliverance on the bill, the letters bore not "Per decretum," but "Ex deliberatione Dominorum Concilii." The third volume of the Juridical Styles exhibits numerous instances in which it was necessary to proceed by bill, and it is proper to advert particularly to the case of the party charged being furth of Scotland.

DATE OF SIG-
NET LETTERS.

DECREE CON-
FORM.

Although a person may have consented to a charge of six days, nevertheless, if he be absent from the kingdom, when charged, the *inducias* must be twenty-one, formerly sixty, days; and he is, in that case, cited edictally at the office of the Keeper of Edictal Citations; A. S., 24th December 1838, sect. 7. By section 53d of the Statute,

EDICTAL
CHARGE AND
CITATION,
WHERE DESTOR
ABROAD.
Dallas' Styles,
vol. ii. p. 12.

- PART II.** 6 Geo. IV. cap. 120, the mode of citation edictally is extended to
CHAPTER IV. persons not having a dwelling-house in Scotland, and forty days
 absent from their usual place of residence, such persons being ap-
 pointed to be charged according to the forms prescribed in the Act.
 This is a point which it is very important for the practitioner to attend
 to. In diligence generally, authority to charge or cite edictally must
 proceed upon a special warrant obtained from the Lord Ordinary in
 the Bill Chamber; *Monteith v. Murray*, 18th July 1677. It was for-
 merly held necessary in diligence at the instance of a foreigner, that
 (in the same manner as in actions) he should appoint a mandatory, at
 whose instance, as well as his own, the charge or other step of diligence
 should proceed. But this has been overruled by the case of *Ross*
v. Shaw, 8th March 1849. It may still be necessary, however, to
 observe a distinction where the diligence proceeds upon a bill, which
 partakes of the nature of a suit, the bill being a petition to the
 Court. See observation of Lord Wood in the case of *Cooke v. Fal-*
coner's Representatives, 26th November 1850.
- M. 3685.
- 11 D. 984.
- 18 D. 169.

LETTERS OF
 HORNING ON
 DECREES NOW
 PRACTICALLY
 SUPERSEDED
 BY 1 & 2 Vict.
 c. 114.

WARRANT TO
 CHARGE IN-
 SERTED IN EX-
 TRACT.

15 D. 414.

The form which we have examined has now been practically super-
 seded by the 1 & 2 Victoria, cap. 114, which directs the insertion in
 decrees of a warrant to charge, arrest, poind, and imprison.* When
 the decree is transferred, the assignee may, by sect. 7, obtain a war-
 rant for diligence at his own instance in the Bill-Chamber. The
 terms of the minute, craving diligence at the instance of an assignee,
 prescribed by schedule No. 5, must be implicitly observed. The place
 and date of the application by the assignee for warrant to charge,
 required by the schedule, having been omitted, a note of suspension
 was passed in *Jamison v. Nelson*, 19th February 1853. By the 8th
 section, it is declared competent to obtain extracts, and letters of
 horning, poinding, arrestment, and caption, according to the former
 law and practices; but, if that course be taken, no part of the expense
 except the expense of the extract is exigible from the debtor, unless
 it be shewn, that, in the particular case, it was incompetent to proceed
 by the forms instituted by this statute. The same section provides
 for issuing new extracts with warrants in lieu of old extracts, or
 subjoining a warrant to the former extract. Sections 9 to 15 inclusive
 contain regulations of a similar nature for execution upon the decrees
 of sheriffs, and upon deeds registered in Sheriff Court books, which
 are to contain warrants and to be followed by execution. Parties
 acquiring right have the same facilities in the Sheriff Court as in the

* Provision is made by the Court of Exchequer Act for insertion of a similar warrant in
 the extracts of decrees for debts due to the Crown, the warrant being, however, addressed to
 Sheriffs. Such extract is declared to be a sufficient warrant to any messenger-at-arms or
 sheriff-officer to execute charge, arrestment, and poinding; 19 & 20 Vict. cap. 56, § 28.
 The extract also contains, after the warrant to arrest, a warrant to seize and detain the
 books of accounts and other books and papers of the Crown-debtor. An execution of such
 seizure must be returned; § 35.

Court of Session; and provision is made for obtaining warrants of concurrence from other sheriffs, rendering execution competent within their jurisdiction, and from the Bill-Chamber, so as to give recourse over the whole kingdom. Examples of critical objections to a sheriff's warrant to charge, and to the execution of the charge, being repelled will be found in the case of *Hanna v. Neilson*, 2d March 1849. As 11 D. 941. diligence now proceeds in almost every case upon an extract of Court, the practitioner should satisfy himself of the accuracy and integrity of the extract. In *Crichton v. Watt*, 25th November 1830, an objection to a charge, that the day of registration was written upon an erasure in the extract was overruled, the month and year being entire, and registration on any day of that month being sufficient, and the protest and the record being also correct. But the Judges' opinions lead to the inference, that, if the month, or other essential part, had been vitiated, the charge could not have been sustained, and, although the charge was sustained, expenses were not allowed to the charger, because he had a claim of relief against the clerk of Court, who had made the blunder in the extract.

Execution of Charge.—The 3d section of the Act prescribes the form of execution, which remains the same as formerly, with this modification, that, by the 32d section, one witness is sufficient for service or execution; and extracts, citations, deliverances, schedules, and executions, may be either printed or in writing, or partly both. What then are the formalities of execution formerly established, and still requiring to be observed?

The charge must be given to the party named and designed in the diligence. But can an extract or letters never be a warrant against a person, unless he is named in them? In certain cases they may. It is well established, that diligence against a company-firm is a sufficient warrant to charge the individual members of the firm, though not named, and that it lies with the messenger to discover who the partners are; *Thomson v. Liddell and Co.*, F. C. 2d July 1812; and the same was held in *Wallace v. Plock and Logan*, 3 D. 1047. 19th June 1841; and in *Knox v. Martin*, 12th November 1847, a 10 D. 50. warrant against a company, and against one partner *nominatim*, was held to authorize a charge against another partner, though not named. (This case contains a practical exhibition of diligence in various shapes under the Personal Diligence Act:—(1.) The Sheriff's decree with warrant; (2.) The warrant of concurrence by the Court of Session, and execution following; (3.) The assignation of the decree, and warrant from the Sheriff in favour of the assignee.) A bond for a cash credit to a company, binding the partners at the time and the company, and those who may afterwards become partners, is a foundation for diligence against future partners, although not named in the warrant; *M'Lean v. Rose*, 9th December 1836. It is 15 S. 236.

FORMALITIES
OF EXECUTION
OF CHARGE.

AGAINST WHOM
CHARGE MUST
BE EXECUTED.

PART II.	competent to register the protest of a bill, granted for a company
CHAPTER IV.	debt, against the company, and one partner, within the jurisdiction
16 D. 339.	in which that partner is domiciled, although another partner, against whom no diligence is used, resides in another jurisdiction. It was so found in <i>Sutherland v. Gunn</i> , 17th January 1854. In that case the company, which was dissolved, had carried on business in the same place, in which the individual partner charged resided. Diligence may also be used at the instance of a company named by a proper firm, although none of the partners be named in the warrant. But this rule does not extend to companies using a descriptive firm, which can only sue or charge at the instance of their partners, or, under special powers, at the instance of an office-bearer. The law upon this subject was carefully examined and settled, upon the footing now stated, by the whole Court, in <i>Forsyth v. Hare and Company</i> , 18th November 1834. The strictness required in the execution of diligence is shewn by <i>Craig v. Brock and Ferguson</i> , 23d November 1841, where there was a warrant authorizing execution at the instance of a company with a proper firm, and of the partners <i>nominatim</i> . The messenger's charge was given as at the instance of the partners without naming the firm, which was held an unwarrantable deviation from the warrant, rendering the charge invalid. A charge against a minor is null, unless the tutors and curators are also charged; <i>Ramsay v. Renton</i> , 18th January 1672.
DILIGENCE AT INSTANCE OF A COMPANY.	
13 S. 42.	The messenger-at-arms or other officer must have the warrant in his possession. But he is not bound to exhibit it to any one, except the party charged; <i>Lermont v. Lermont's Heirs</i> , 11th July 1699; and it will be presumed, that the warrant was in his possession, unless the contrary be proved.
4 D. 54.	
2 Br. Supp. 627.	
M. 3096.	
PLACE WHERE CHARGE TO BE GIVEN.	Where is the charge to be given? This is regulated by the Act 1540, cap. 75, which applies to diligence, as well as summonses, and directs the officer, if he cannot apprehend the party personally, to pass to his principal dwelling-place, exhibit the warrant, execute the charge, and offer a copy of the letters or precept to the servant, which, if refused, he is to affix to the door or gate of the house. If entrance is not obtained, the officer is to give six knocks, and make the execution in presence of witnesses, affixing the copy upon the door or gate. It is clear, that personal execution, when practicable, is to be preferred, as the least open to doubt or question. The Act of Sederunt, 1613, in substituting letters of horning for the letters of four forms, directed the charge to be given not only at the party's dwelling, but at his parish kirk also; but the latter part of this enactment does not appear ever to have received general observance. The debtor is charged personally by delivering to him a charge, called a copy in the older practice. This copy of charge is in name of the messenger, acting by virtue of the warrant, (described by its date,
1540, c. 75.	
EXECUTION AGAINST DEBTOR PERSONALLY.	

and the names and designations of the parties,) and by the Sovereign's authority charging the debtor to pay the principal sum with interest and penalty, as contained in the ground of debt, (which is described by its dates and other particulars,) within the days of charge, under pain of poinding and imprisonment; and it bears the date of execution. When the debtor cannot be found personally, the messenger must, in compliance with the statute, make the execution at his principal dwelling-place. In order to the validity of execution in this manner, it is indispensable, that the place, where the copy is so delivered, be truly the dwelling-place of the party charged. A horning was found null, because denounced at Cupar, the head burgh of Fife, where the party was residing with his family in an inn, whereas the execution should have been made in Edinburgh, where he had a house; *Pater-son v. Fermour*, 20th November 1672. In *Bruce v. Hall*, 13th July 1708, a citation left with a party's servant at a lodging-house in Edinburgh, the master being within and asleep at the time, was found null, because not being served personally it ought to have been served at his dwelling-place in the country. According to the same strict rule, arrestment executed against a merchant, by leaving a copy at his counting-house, where he does not reside, has repeatedly been held inept. See the cases of *Fraser, Reid, and Sons v. Lancaster and Jamieson*, 14th January 1795; and *Sharp, Fairlie, and Co. v. Garden*, 21st February 1822. But, if the execution or charge be served at what is truly the party's dwelling-place, it is sustained, although he may at the time be resident elsewhere, as in *Douglas and Heron v. Armstrong*, 23d November 1779, where a summons against an advocate having been executed during vacation at his house in Edinburgh, the execution was sustained, although he was at the time living at his estate in Dumfries-shire, attending to his duties as sheriff of that county; and in *Horne v. Eccles' Creditors*, 30th July 1725, execution of arrestment at a house taken by the arrestee for his children in Edinburgh, and where he was at the time of serving the diligence, was sustained, although his ordinary dwelling-place was in the country. If admission to the dwelling-house is obtained, the messenger delivers a copy to the debtor, should he appear, and if he does not appear, it is delivered to his servants. Should they refuse it, he must, in terms of the statute, affix it to the principal gate or door of the house. If admission is not procured, then, in pursuance of the statute, the messenger must give six knocks loud enough to be audible to those within, and afterwards affix the copy to the door or gate. When the knocks are not given, or are given so as not to be audible, the execution will be annulled.

The evidence of the service or charge is, what was formerly called the messenger's indorsation, because written on the back of the

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EXECUTION AT
THE DEBTOR'S
DWELLING-
PLACE.

M. 3724.

M. 3696.

M. 3706.

1 S. 337.

M. 3700.

M. 3704.

THE EVIDENCE
OF THE EXECU-
TION OF
CHARGE.

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letters, and is now termed the *execution*. It is an attestation by the messenger of his having executed the writ or diligence in due form. By the statute 1540, every officer is required in his indorsation to describe the mode of execution, so as to shew that it was made in one or other of the ways prescribed by the statute. Accordingly, the execution, after giving full particulars, as in the charge, bears, that it was done either, (1), by delivering a just copy of charge to the debtor personally apprehended; or, (2), by leaving the copy charge for the debtor within his dwelling-place in _____, with a servant, because he could not be found personally; or, (3), by affixing and leaving the copy for the debtor within the lockhole of the most patent gate or door of his dwelling-house in _____ street _____, after giving six audible knocks upon the gate or door, as use is, because the messenger could neither get access into the said dwelling-place, nor find the debtor personally. The omission in the execution of the solemnities appointed in the Act is fatal to its validity; and in *Hay v. Lady Ballegerno*, 19th November 1680, an inhibition was found null, the execution bearing, that "*several* knocks" were given, and not, in terms of the Act, the precise number of *six*. In another case, an execution, bearing delivery of a copy to servants for their master, was held null, because not bearing, that it was so delivered at their master's dwelling-house; *Nisbet v. His Factor*, 30th July 1736. It has been held, however, not indispensable to specify the dwelling-house by name, when the party is described by his known style—e.g., Sir John Heron Maxwell of Springkell—which includes the name of his dwelling-place, and so satisfies the requirements of the law; *Scott v. Fisher*, 2d December 1825.

M. 3790.

Elchies, voce,
"Execution,"
No. 2.

4 S. 261.

FORMALITIES
AND ATTESTA-
TION OF EXECU-
TION.

By the Act 1681, cap. 5, it is declared, that none but subscribing witnesses shall be probative in messengers' executions of inhibitions, of interdictions, hornings, or arrestments, and it is required under the pain of nullity, that the witnesses be designed in the body of the execution. Although, by the recent Personal Diligence Act only one witness is required, these provisions remain in force as regards his signature and designation. The name and designation of the witness must also appear in the copy or schedule served upon the party; and for want of this arrestments were found inept in *Stewart v. Brown*, 22d May 1824.

3 S. 56.

IT MUST ACCU-
RATELY RECITE
WARRANT.

It is a vital point in the validity of the execution, that it set forth with minute accuracy the particulars of the warrant. If the authority for the charge be misrecited, the charge is without a foundation, and cannot stand. So, in *Watts v. Barbour*, 1st July 1828, a charge upon a Sheriff's precept of poinding was suspended, the precept being described in the copy charge as dated 7th November, while the true date was 7th December. And, in *Hog v. M'Lellan*, 2d June 1797, a poinding was defeated, because the execution of horning, upon which

6 S. 1048.

M. 8346.

it proceeded, was of a date obviously erroneous, being prior to the date of the letters. In an execution under the new forms, it was objected to a charge, that it described the warrant as an "extract "registered protested note or bill of exchange," while the true warrant was the extract registered protest only. It was not necessary to pronounce judgment on this point, but the Judges considered that the validity of the execution was too doubtful to have justified an agent in resorting to imprisonment; *Glen v. Black*, 19th November 4 D. 38. 1841. An erroneous execution of arrestment may be corrected by an amended execution, when there is no competition; *May v. Malcolm*, 4 S. 76. 7th June 1825; and two of the Judges were of opinion, that the amended execution would have availed even in a competition. At first, the execution was not signed by the witnesses, and it had no authentication except the messenger's signet or stamp, required by 1540, cap. 74. By 1686, cap. 4, stamping was dispensed with, and the subscription of the messenger and witnesses required under the sanction of nullity; and 1693, cap. 12, directs that all copies served shall bear at length, and not in figures, the day and date of delivery, and also the names and designations of the witnesses, in the same way as the execution. These enactments are to be regarded as still in force, excepting in so far as superseded by the recent statute, which makes one witness sufficient. 1686, c. 4. 1693, c. 12.

Denunciation.—If the charge was not obeyed within the days of *induciæ*, the penalty of disobedience was incurred, and the party might immediately be denounced rebel. This was done by the messenger repairing with two witnesses to the market-cross of Edinburgh, or of the head burgh of the shire of the debtor's residence, where after three several oyeses, (*i.e.*, calling upon the lieges to listen,) he read the letters aloud, and blew three blasts of a horn. In this last ceremony consisted the proclamation of the debtor as a rebel to the Sovereign, and the forfeiture of his moveables to the Crown. A copy of the letters and execution was affixed to the market-cross. Long before the date of the Personal Diligence Act, the actual observance of these ceremonies had ceased, but the messenger returned an execution in the same terms as if they had been literally fulfilled. Denunciation could be made only within a year and day of the date of the charge, a new charge being requisite, if a longer time had elapsed; and, after being made, it was null, if the horning and executions were not registered within fifteen days in the books of the shire, or in the general register of hornings. MANNER OF DENOUNCING REBEL. PERIOD WITHIN WHICH DENUNCIATION CAN BE MADE.

Before 1746 the effects of denunciation were these:—

(1.) The denounced debtor's moveable estate fell as escheat to the Crown, the creditor, upon whose diligence he was denounced, being entitled in the first place to payment of his debt. This effect in EFFECTS OF DENUNCIATION. 1. SINGLE ESCHAT.

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2. LIFERENT
ESCHEAT.

ii. 5, 53.

20 Geo. II.
c. 50.3. ACCUMULA-
TION OF THE
DEBT AND
INTEREST.4 IMPRISON-
MENT.FORM OF LET-
TERS OF CAP-
TION.

favour of the Crown, which is called the single escheat, is still incurred by denunciation for a crime.

(2.) The debtor's heritable estate fell under the liferent escheat—that is, the rents and produce of his land were forfeited to the superior during his life. This is the reason why Mr. Erskine, in his *Institutes*, treats of diligence by horning under the title of “Rights of Superiority and its Casualties.” This casualty still arises in the case of crimes, but, by the Heritable Jurisdiction Act, 20 Geo. II. cap. 50, passed after the rebellion of 1745, the casualties both of single and of liferent escheat, incurred by horning and denunciation for civil debts, were abolished from 1748.

(3.) By the Act 1621, cap. 20, denunciation received the effect of converting every sum, for which the debtor was charged, into principal, so as to bear interest; and this effect still follows, interest being accumulated with principal after denunciation. In order to produce this effect, it was necessary that the denunciation should take place at the head burgh of the debtor's domicile. But, by the Personal Diligence Act, § 5, the registration of the execution, which is substituted for denunciation, is declared to have the effect of accumulating the debt and interest into a capital sum, whereon interest shall thereafter become due; and the same effect is, by § 10, extended to registration in the Sheriff's books.

(4.) Another important effect of denunciation was, that the denounced rebel became subject to imprisonment at the suit of his creditor, which brings us to the subject of

2. *Caption*.—The debtor being denounced, and the horning and execution registered, the creditor is entitled to apprehend and incarcerate him. By the previous practice, this was effected by letters of caption, which were procured by presenting a bill, to the same effect in substance as the letters themselves, which we are about to examine. Along with the bill was produced the registered horning and executions, and the Bill-Chamber clerk's *fiat* upon this bill, granted, “because the Lords have seen the registered horning,” was the warrant for the writ, which accordingly passed *Ex deliberatione Dominorum Concilii*. After the address, in the same terms as in the horning, the letters of caption bear:—“*That upon the*” (date of denunciation,) “*the debtor was orderly denounced rebel and put to the horn by virtue of letters of horning, &c., for not making payment of the sum of,*” &c., the sum being specified, as well as the ground of debt, and the warrant as mentioned in the horning; “*as the same, with the executions thereof duly registered, shewn to the Lords of Our Council and Session have testified,*”—(that is, when exhibited in the Bill-Chamber, in order to obtain the warrant for caption.) Then comes the will, which is not merely an injunc-

tion to apprehend, but a command to direct others also to do so:—
*"Our will is herefore, and We charge you, that on sight hereof ye
 pass, and in Our name and authority command and charge the
 sheriffs of Our sherriffdoms, stewarts of Our stewartries, and their
 deputies, the provosts and magistrates of Our burghs, as also messen-
 gers-at-arms, to pass, search for, seek, take, and apprehend the per-
 son of,"* (the debtor,) *"wherever he can be found, within the bounds
 of their respective jurisdictions; and being so apprehended, to put
 him in sure ward, firmance, and captivity, within their respective
 tolbooths, or other warding places; keep hold and detain him therein
 upon his own charges and expenses, aye and until he fulfil and obey
 the command and charge of Our said letters of horning."* Then
 came a warrant to intrude, if necessary, into private dwellings and
 apartments in searching for the party:—*"And if needful that ye
 make all shut and lockfast houses, gates, and doors, and other lock-
 fast places, open and patent, and use Our keys thereto."* The
 King's keys are the hammers, or other implements which may be
 required to obtain entrance. Then came the *induciae* of the charge
 to the magistrates:—*"Within three days next after they are
 charged, under the pain of rebellion, and putting them to the horn."*
 And the penalty of their disobedience follows:—*"With certification
 if they fail, the said space being elapsed, Our other letters will be
 directed, charging them thereto simpliciter."* Formerly, by virtue
 of this certification, upon neglect by the magistrates letters of second
 caption against the magistrates themselves could be procured, but
 these have now been long obsolete. The letters of caption conclude
 with the same words of form as the horning.

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 FORM OF LET-
 TERS OF CAP-
 TION, contd.

The new forms, by which the caption, though still competent, has
 been practically superseded, are contained in sections 5 and 6 of the
 Personal Diligence Act, 1 and 2 Vict. cap. 114, which make it com-
 petent, within year and day after a charge has expired, to record the
 execution in the register of hornings,* which registration is declared
 to have the same effect, as denunciation and registration of the
 horning and executions previously had. It is to be observed, that,
 as it is only the execution which is registered under the new forms,
 the messenger, although he writes it on the back of the extract,
 must insert the names and designations fully, in order that these may

MODERN FORMS
 SUPERSEDING
 LETTERS OF
 CAPTION.

* By § 83 of the Court of Exchequer Act, it is competent for the Sheriff to cause extracts of decrees for debts due to the Crown, and execution of charge thereon to be presented to the Sheriff-Clerk of the county where the charge was given, and the Sheriff-Clerk must record the execution in the register of hornings kept by him, such registration being declared to have the same effect as the registration of any expired charge given in terms of 1 & 2 Vict. c. 114. The Sheriff-Clerk then indorses a certificate of registration, and it is thereupon competent for the Sheriff to issue a warrant to imprison; § 34. The Act contains schedules having a similar object with those annexed to 1 & 2 Vict. c. 114; but no minute is necessary, as under the latter Act.

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- appear in the register of hornings. By section 6, the Keeper of the register of hornings is to give a certificate of registration, and then warrant of imprisonment can be obtained by presenting, along with the extract and execution and certificate of registration, a minute in the Bill-Chamber, (which minute is indorsed upon the extract,) in terms of a schedule subjoined to the Act. The minute is signed by a Writer to the Signet, and craves warrant to apprehend, imprison, and open shut and lockfast places, and warrant also to magistrates to receive and detain. The schedule, appended to the Act, which gives the form of this minute, requires the place and date to be prefixed to it, and the omission of these is fatal; *Sim v. Yuile*, 15th November 1845. Other deviations from the appended forms in points less material were not sustained as fatal objections, in *Cleland v. Clason and Clark*, 15th February 1849. Upon this minute the clerk is to write his *fiat*, and then the extract and deliverance can be used for the same purposes, and are declared to impose the same obligation upon magistrates, as if letters of caption had been issued. Section 11 empowers the Sheriff to issue warrant of imprisonment in similar terms. In this case, the minute must be subscribed by the creditor, or by a procurator of the Court. It is not necessary that the minute in the Sheriff-Court be in the handwriting of the creditor or of a procurator of Court, if it be subscribed by either. A minute written by the procurator's clerk was sustained in *Allan v. Miller*, 24th June 1848.
- The first important point is, that the *induciae* must have expired, before warrant of imprisonment is applied for. In *Lyle v. Greig*, 27th June 1827, a caption, raised before expiration of the *induciae*, was found inept. Again, this being a writ directed against the liberty of the subject, it is subjected to the strictest requirements of regularity and integrity. This doctrine was strongly stated and illustrated in a case, where the party's name in a caption was written on erasures, and the execution was found in consequence to be inoperative, even to produce the legal consequence of bankruptcy; *Duncan v. Houston*, 13th February 1833, affirmed 15th August 1834. Nor are the effects of vitiation in writs of imprisonment confined to such vital parts as the debtor's name. Letters of caption have been suspended on account of an error in reciting the date of the contract; *Hassett v. Walker*, 5th July 1834. Under the new forms, the liability to error is not so great, but the same principles will be applied. If the debt has been paid in part after the date of the extract, a restriction ought to be indorsed, as it will be dangerous to imprison the debtor, without specifying the amount actually due at the time; *Garden v. M'Coll*, 13th December 1826. Here two of the Judges held the omission to indorse a partial payment fatal, while Lord GLENLEE, following the strict legal view of the diligence,

8 D. 8.

11 D. 601.

10 D. 1411.

5 S. 845.

VITIATION IN
WARRANTS OF
IMPRISONMENT.
See *infra*, p.
303.

11 S. 383.

7 Wil. & Sh.
App. 519.

12 S. 932.

5 S. 123.

said:—"There is no such thing as arresting a debtor for any particular sum more than another. He is arrested for disobeying the charge." He adds:—"It is certainly proper, however, that he should know immediately, how much he requires to pay in order to get free;" and no prudent practitioner will omit to make that information to appear upon the warrant.

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The magistrates bound to attend to warrants of imprisonment were those whom the law formerly obliged to have sufficient prisons, and if, when charged to concur in making the diligence effectual, they refused or delayed, they were liable in payment of the debt. The Court interfere to prevent the execution of caption, where the apprehension and imprisonment of the debtor, or the mere touching of his body, may endanger his life; *Johnstone v. Glen*, 9th March 1850. 12 D. 903. The magistrates were also liable if the debtor escaped through the insufficiency of the prison, or through the neglect or connivance of the jailer. These liabilities, however, are removed by the 18th section of the Act, 2 and 3 Vict. cap. 42, transferring the charge and maintenance of prisons to a Public Board.

LIABILITY OF
MAGISTRATES AS
TO PRISONS, &c.

Apprehension, though not followed by imprisonment, is sufficient to make the debtor notour bankrupt; *Scott v. North of Scotland Banking Company*, 18th January 1855. According to this decision also, it is not essential that the messenger touch the debtor with his wand of peace, in order to imprisonment in terms of the Statute.

17 D. 292.

After a debtor has been imprisoned, it is competent for other creditors than the one at whose instance incarceration took place to arrest him in prison, by lodging their warrants of imprisonment with the jailer, which will cause him to be detained at their instance, although the claim of the incarcerating creditor may be discharged. The jailer must always have in his possession either the principal warrant, or a certified copy, for the debtor is entitled at any time to require exhibition of the warrant upon which he is detained.

Formerly an imprisoned debtor could not be discharged, except by the formal process of expeding letters of suspension and liberation. The creditor's consent was not sufficient, because, although he could discharge his own claim, he could not acquit from the claims of the Crown. But by the modern practice, the debtor is released upon a discharge of the debt, and it was settled, that he is entitled to liberation upon consigning the amount of the debt in the hands of one of the magistrates of the place where the jail is situate; *Forbes* 2 S. 169. *v. Alison*, 31st January 1823.

DEBTOR, HOW
DISCHARGED
FROM PRISON.

Until a recent period, the only execution for debt in Scotland which was direct, and without a fiction, was the Act of Warding—a power of imprisonment, granted in the 14th century to the magistrates of Royal burghs for the encouragement of merchants. This still subsists. It can only be exercised, of course, against parties

ACT OF WARD-
ING.

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M. voce "Burgh
Royal," App.
No. 14.

POWER OF IM-
PRISONMENT
CONFERRED
UPON INFERIOR
JUDGES.

SANCTUARY.

F. C.

ACT OF GRACE.
1696, c. 32.

8 S. 306.

8 D. 408.

BOND OF PRE-
SENTATION.

6 S. 123.

domiciled within the burgh ; and the debtor may be apprehended at once without the necessity, as was once supposed, of a previous search for goods belonging to him ; *Marshall v. Lamont*, 8th March 1803. With the exception of the Act of Warding, no inferior Judges formerly possessed the power of imprisonment for civil debts, until it was conferred on Justices of the Peace by the Small Debt Act ; and, by the 6th Geo. IV. cap. 24, upon the Sheriffs. Now, by the 5 and 6 Will. IV. cap. 70, imprisonment is incompetent, unless the debt exceeds £8, 6s. 8d., exclusive of interest and expenses.*

The Abbey of Holyrood-house, and adjacent grounds including Arthur Seat, form a sanctuary, where debtors by conforming to certain regulations obtain protection from the diligence of creditors against their persons. They become subject, however, to imprisonment in the Abbey Jail for debts contracted within the sanctuary ; *Berry v. Bowes*, 24th February 1820. In the ancient law language the sanctuary is called THE GIRTH, as forming a circle within which the person is safe. The Duke of Hamilton is Master of the Girth, *i.e.*, Keeper of the Abbey, within which he exercises jurisdiction by a bailie.

By the Act 1696, cap. 32, when the debtor is unable to maintain himself, the creditor is required to provide aliment, and, if he refuse or neglect for ten days, liberation ensues, after which a change of circumstances must be shewn, to authorize a new imprisonment ; *Mackenzie v. Maclean*, 14th January 1830 ; unless the liberation shall have been occasioned by error imputable to the debtor himself ; *Pender v. M'Arthur*, 28th January 1846.†

Bond of Presentation.—The object of diligence against the person is frequently attained, without resorting to the extremity of imprisonment. When the debtor is apprehended, the messenger is generally authorized, instead of taking him straight to prison, to allow him, if he desires it, to communicate with his friends. But it must be carefully observed, that the messenger cannot carry an apprehended debtor anywhere but to prison, unless the prisoner himself desires it. In the case of *Garden*, already cited, damages were awarded against the creditor, because the messenger, instead of taking the debtor straight to jail, took him to the office of the creditor's agent. When the debtor desires it, however, he is generally detained without imprisonment, and allowed to negotiate with a view either immediately to procure funds, or to obtain time for making an

* The recent Act, 19 & 20 Vict. c. 46, exempts from the operation of this Act imprisonment under the Statute, 5 Geo. IV. c. 96, passed to consolidate and amend the laws relative to the arbitration of disputes between masters and workmen.

† The Crown is bound, under the Act of Grace, to aliment its debtor, incarcerated for non-payment of taxes ; *The Advocate-General v. Magistrates of Inverness*, 29th January 1856.

18 D. 366.

arrangement. The latter course is accomplished by a friend becoming bound, that the debtor shall, within a specified time, appear and again subject himself to the creditor's diligence, upon which the creditor consents to his liberation. The same arrangement may be made for a temporary release, after imprisonment has taken place. In order to be effectual, the obligation to present a debtor's body must be in writing, not being capable of proof by parole; *Chaplin v. Allan*, 5th February 1842. Here it was pleaded, that the verbal engagement had been validated by *rei interventus*, the diligence having been withdrawn upon the faith of it, but the Court did not consider that ground relevant to allow a proof by parole. The deed, by which this obligation is undertaken, is called the bond of presentation.

It narrates that the debtor is in custody—the nature and date of the warrant—the amount of the debt—and that the creditor has agreed to delay incarcerating, or to liberate, upon the granter becoming bound. Then, he binds and obliges himself and his representatives to present the debtor to the messenger, who is named, or to any other messenger holding the warrant, at a place specified; or, if it is a case of liberation, to present him to the jailer to be entered as a prisoner under the creditor's diligence upon a day, and between hours, specified. The form in the Style-book adds a clause, which is however implied, though not expressed, viz., that the debtor shall be in the same condition as at present, without any suspension, sist, protection, or privilege, which may prevent the warrant being put in execution; and, in case of failure to present in such condition, the obligant binds himself to pay the debt with interest and expenses. In implementing this obligation, it is necessary to be very punctual in attendance at the time and place specified; and it is advisable, that, in case of non-attendance upon either part, both parties should be prepared to have it certified by a notarial instrument; the obligant protesting, if the creditor or messenger does not attend, that he has performed his obligation by presenting the debtor, and is discharged of his bond and penalty—the creditor, on the other hand, protesting, if the debtor fails to appear, that the obligant has become liable in payment of the debt. But, although punctuality is to be observed, the creditor will not be allowed to take a sharp advantage. The Court can only countenance a moderate relaxation of strictness in point of time, but, where there is *bona fide* performance, the forfeiture will not be incurred, though the party be a few minutes before or after the hour; *M'Gown v. Neilson*, 27th November 1829. Here the obligant was bound to present by one o'clock on a day specified, and the debtor was in attendance at half-past twelve. The creditor not having arrived, the debtor went out for a few minutes. The creditor came at one, and left at a quarter-past one. The debtor returned before half-past one, and sent immediate notice to the credi-

TERMS OF BOND
OF PRESENTA-
TION.

Vol. ii. p. 110.

OBLIGATION TO
PRESENT MUST
BE PUNCTUALLY
PERFORMED.

8 S. 142.

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NOTICE TO CREDITOR OF DEBTOR'S SURRENDER.

12 S. 699.

UPON WHAT GROUNDS OBLIGANT FREED FROM ENGAGEMENT TO PRESENT.

M. 1809.

5 D. 338.

M. 1807.

9 D. 679.

OBLIGANT IN BOND OF PRESENTATION HAS NO RELIEF AGAINST CAUTIONER FOR THE DEBT.

tor, that he was in attendance. The Court held, that the obligation had been duly performed, the Judges observing, at the same time, that each case must be judged of by its own circumstances, and that very precise terms would be required to produce the rigid effect contended for by the creditor in this instance. If a certain hour be not fixed, the obligation being to produce before a certain day, or being otherwise more or less indefinite, the obligant will not be relieved by producing the debtor, unless he give notice to the creditor of the time when the surrender is to take place, in order that he may be prepared to put his diligence in effect; *Macfarlane v. Whitson*, 10th June 1834. Here a debtor was returned to jail, but without notice to the creditor, and, as the jailer still held the creditor's consent to liberate, he could not be detained. The bond was, therefore, forfeited.

Will the obligant be freed from his obligation upon any ground, if he fails to produce the debtor at the place and time appointed? It is not doubted, that the death, or the sickness of the debtor, duly certified as disabling him from attendance without danger to his life, would exempt from forfeiture, all such obligations being necessarily subject to the hindrances of nature or calamity. But such obstacles to presentation as result from the act of the debtor do not liberate the cautioner; so the debtor's enlistment, though it liberates him, subjects the obligant in the bond of presentation; *Henderson v. Graham*, 22d July 1710; and the obligant remains also liable, if the debtor betake himself to the sanctuary; *Douglas v. Black*, 17th December 1842; and, when the detention of the debtor which prevents his surrender results from the debtor's own liabilities, as when he is arrested upon another caption, the obligant forfeits the debt; *Polstead v. Scot*, 7th July 1681.* After the liability of the obligant has been incurred by non-production of the debtor, the creditor must be cautious in dealing with the debtor, if he intends to insist against the obligant, since the obligant will be entitled to the immunities of a cautioner, if the debtor receive indulgence or a discharge. Any negotiation with the debtor, therefore, should be with the concurrence and authority of the obligant, which will be seen correctly exemplified in *Dixon and Douglas v. Thomson*, 12th February 1847.

The obligant in a bond of presentation, who incurs the liability and pays the debt, has no claim of relief against a cautioner for the debt. The cautioner had an interest for his own relief in the success of the diligence against the debtor, and, consequently, an interest also in the fulfilment of the obligation of presentation, and therefore, the obli-

* "It may well be doubted, notwithstanding an old case to the contrary, whether the cautioner is liable, should the debtor be taken, in the meanwhile, on another caption; for this, in one sense, is an inevitable accident, and the creditor has all the benefit that he could have had by himself imprisoning the debtor, there being no preference by priority of personal execution."—*Bell's Commentary*, i. 386; see also *Bell's Illustrations*, i. 206.

gant's failure to present, by which the cautioner suffers, cannot be made the ground of a claim against him; *Graham v. Little*, February 1731; *Smith v. Ogle*, 11th December 1811.

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CHAPTER IV.
M. 3364.
F. C.

Diligence under the warrant of imprisonment is important, as we shall afterwards see, not only as a direct means of compulsion, but as one of the modes also by which the preference of particular creditors may be defeated, and a rateable distribution of the debtor's effects secured amongst creditors who take certain steps to obtain an equal ranking within a certain limited period.

3. *Poin ding*.—The extreme measure of attaching the debtor's person will rarely be resorted to, if the debtor have visible property, capable of being attached for payment of his debts. We shall consider, first, the diligence against moveables, by which the property can be most speedily and directly attached, and its proceeds applied at once in satisfaction of the creditor's claim. It is called "poin ding"—a name derived from the practice, still observed in England, upon seizure of a debtor's cattle, of securing them in an enclosure or "pound."

Poin ding is of different kinds. The process by which proprietors of land make their right of hypothec available for recovering the rents due to them out of their tenants' effects, is of the nature of poin ding, although not known by that name. Superiors for their feu-duties, heritable creditors for their debts, and generally those not in possession, who have a real right affecting the land, have recourse against moveables on the ground, restricted as regards the tenant's moveables to the amount of the term's rent, by a process called Poin ding the ground. In our ancient practice, the tenant's property might be poin ded for the landlord's debt, a violation of the principles of justice traced by Lord KAMES to the original condition of the tenants as serfs, and incapable as such of holding property. Poin ding was also the diligence by which land itself was formerly attached, or, as it was called, apprised—a process for which, in 1672, adjudication was substituted. Poin ding the ground is a step of real diligence, and does not, therefore, fall within the subject now to be treated of, which is personal poin ding—the attachment of the debtor's moveables in immediate satisfaction of the creditor's claim.*

DIFFERENT
KINDS OF
POIN DING.

The decrees of the Supreme Courts are grounds upon which poin ding may proceed, and also the decrees of Inferior Courts, to which a precept of poin ding is subjoined. But the Inferior Courts cannot authorize this mode of recovery, when acting under special Statutes which direct diligence of a different kind, and, therefore, a poin ding upon a warrant by Justices of the Peace under the Excise Statutes was found to be illegal, because these statutes direct recovery by

WARRANTS FOR
POIN DING.

F. C. App.
(Court of Justi-
ciary,) No. 1.

* See note †, p. 302, *infra*.

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distress; *His Majesty's Advocate v. Forgans*, 20th February 1811. Until the recent Personal Diligence Act, warrant for poinding was, as we have seen, inserted in the letters of horning passing the Signet, and which, when this also was inserted, as was generally the case, were called letters of horning and poinding. The authority to poind was contained, of course, in the will or command, and occurred, in combination with authority also to arrest, immediately after the order to denounce, in these terms:—"Attour" (i.e. moreover) "*that ye lawfully fence*," (i.e. protect from interference,) "*arrest, apprise*," (i.e. value with a view to appropriation or sale,) "*compell*," (i.e. drive in cattle,) "*poind and distrain all and sundry the said*" (debtor's) "*readiest moveable goods, gear, debts, and sums of money, and other moveable effects of whatever denomination, make penny thereof to the avail and quantity of the foresaid sums, and see Our said lovite completely paid and satisfied of the same.*"

LETTERS OF
OPEN DOORS.

Letters of caption, as we have seen, contained a warrant to open shut and lockfast places. When access was not obtained for the purpose of poinding, the messenger returned an execution stating the fact, and upon production of the diligence and execution a warrant was obtained in the Bill-Chamber for letters of open doors, which passed the Signet, of new charging messengers to poind, and, if needful, to make shut and lockfast houses, gates, and doors, and other lockfast places, open and patent. By the Personal Diligence Act, 1 & 2 Vict. cap. 114,* we have seen that the extract of the decree now contains a warrant to charge for payment under the pain of poinding and imprisonment, and also to arrest and poind; and by § 4 it is enacted, that, after the days of charge, it shall be lawful, by virtue of such extract, to poind the moveable effects of the debtor, as if letters of poinding, or letters of horning containing warrant to poind, had been issued, and for that purpose to open shut and lockfast places. Under these warrants it is competent to poind for the principal sum of the debt with interest, and also, by universal practice, for as much as will cover the expense of the diligence; *M'Neill v. M'Murphy, Ralston, & Co.*, 13th February 1841.

WARRANT TO
POIND NOW
CONTAINED IN
EXTRACT
DECREE.

3 D. 554.

WHEN MAY
POINDING PRO-
CEED?

When may the poinding proceed? By 1669, cap. 4, it was declared not lawful to poind for personal debts, until the party had been charged, and the days of charge had expired; and this rule, we have seen, is continued by the recent Statute. This diligence, however, does not require, like caption, to proceed within year and day of the charge, but is competent even at a distance of years after a charge, and without renewing it; *Kerr v. Barbour*, 30th May 1837. And, while a caption may be put in force at any hour of the day or night, a poinding is valid only if done in daylight. In *Douglas v. Jackson*, 11th February 1675, the Lords found a poinding not valid,

15 S. 1041.

M. 3739.

* As also by the Court of Exchequer Act, 19 & 20 Vict. c. 56.

unless begun before sunset, and ended during the daylight. Stair lays it down, that pointings on the LORD'S-DAY, or on solemn days appointed by the Church or State for humiliation and thanksgiving, are void; and a pointing executed upon Sunday was found null, in *Mortimer v. Scrimzeour*, 9th February 1622.

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iv. 47, 27.
M. 15001.

What goods of the debtor are subject to the diligence of pointing? It is available against all his corporal moveables,* except ships, in every part of the kingdom with the single exception of the Palace of Holyroodhouse, which cannot be entered to execute diligence, not because it is within the sanctuary, but because it is a Royal residence; *Earl of Strathmore v. Lang*, 18th February 1823; reversed 22d February 1826. Mr. Ross considers that the words, "*sums of money*," in the letters of pointing, belong to the warrant of arrestment. A question was however raised in *Alexander v. M'Lay*, 10th February 1826, whether bank-notes had been competently pointed, but it was not decided. Growing corns may be pointed; *Ballantine v. Watson*, 15th June 1709; but a pointing of wheat merely braided, and of clover-grass, was found ineffectual in *Elders v. Allen*, 5th July 1833. It is no objection to a pointing that the goods have been arrested, if there be no decree of furthcoming following upon the arrestment, for without such decree arrestment is an imperfect diligence. But, after decree of furthcoming, or a warrant to sell for behoof of the arrester, pointing is incompetent; *Stevenson v. Grant*, 27th July 1767. Nor can the sale be stopped by arrestment used in the hands of the debtor, owner of the pointed effects, by creditors of the pointing creditor after warrant of sale is obtained, because—the proceeds being consigned with the Clerk of Court—the claims of the arresting creditors would be in no degree affected; *Anstruther v. Lewis*, 22d February 1851. Of the goods not pointable the most remarkable are plough goods, or implements of husbandry, which, after the authority of the Civil Law, are by 1503, cap. 98, exempted from this diligence during the season of labouring. The goods specified in the Act are oxen, horse, and other goods pertaining to the plough, and the exemption takes place only where the debtor has other goods that may be pointed. The pointing of plough goods is unlawful, unless a previous search be made for others; *Lord Advocate v. For- gans*, 20th February 1811. It is not competent to point goods of which the debtor is only joint-proprietor; *Fleming v. Twaddle*, 2d December 1828; or goods in which he has only a qualified and temporary interest, as a liferent; *Scott or M'Millan v. Price*, 13th May 1837.

GOODS POINT-
ABLE.
2 S. 223; 2 Wil.
and Sh. App. 1.
4 S. 439.
M. 10526.
11 S. 902.
M. 2762.
13 D. 778.
F. C. App.
(Justiciary) No.
1.
7 S. 92.
15 S. 916.

Form of Execution of Pointing.—The mode of executing pointings

* By the Court of Exchequer Act, § 32, it is lawful for the Sheriff to cause point a Crown-debtor's "whole moveable effects without exception, including bank-notes, money, bonds, bills, crop, stocking, and implements of husbandry of all kinds."

FORMER PRACTICE IN EXECUTION OF POINTINGS.

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was materially altered by the recent Personal Diligence Act. Formerly, it was requisite that the poinded goods should be twice appraised or valued; first, at the time of poinding, and afterwards at the market, when removed there for sale. It is unnecessary now to dwell upon these and other forms which have been abolished or modified, and will be found particularly described in Erskine's Institutes. The old practice was first altered by the old bankrupt Statute, 54 George III., cap. 137, § 4. And it is now regulated by sections 23 to 32 inclusive of 1 & 2 Vict. cap. 114, under which, combined with such of the ancient forms as are still retained, the procedure is as follows:—

MODERN PRACTICE IN EXECUTION OF POINDINGS.

SCHEDULING AND VALUATION OF GOODS.

TENDER OF PAYMENT BY DEBTOR.

Bell's 8vo cases, 355.

IF GOODS CLAIMED BY THIRD PARTY?

M. 10522.

M. 10529.

The messenger-at-arms goes along with two persons who are to act as valuers or appraisers, and who, by § 25, may also act as witnesses to the poinding, to the debtor's dwelling-house, or other place where the goods to be poinded are situated. He cries three oyesses, reads the warrant, and the execution sometimes bears that he displays his blazon—that is, an impression of the King's arms, in brass or silver, fixed upon his breast, and from which his office derives its name, but this formality is generally omitted. He then proceeds to make a schedule of the goods poinded, and of the values as fixed by the valuers under an oath administered to them by the messenger. The goods are then three times offered back to the debtor, or to any one in his name who will pay the debt or the appraised value. The messenger, however, cannot, without special authority, grant an effectual discharge, and, as the debtor will pay to him at his own risk, the money should be consigned (when the messenger has no mandate or receipt) in the hands of the clerk of Court, or in a bank of undoubted responsibility. When payment is thus tendered, either of the full debt, or of the value of the goods, although less than the amount of the debt, the poinding must be stopped; and, contrary to the opinion of Bankton and other previous authorities, the same goods cannot, after such payment, be poinded a second time for the same debt; *Fiddes v. Fyfe*, 16th February 1791. Should the debtor allege that the goods, although in his possession, are not his property, that will not stop the poinding; but if a third party appear and claim the goods, the messenger may take his oath, and interrogate him, so as to discover the truth, and may proceed with the poinding if the claim appear to be collusive. But, should the party appearing produce a written conveyance, and support it with his oath, the messenger cannot judge of the effect of such a writing, and must desist, whatever indications of connivance there may be; *Breadalbane v. Sinclair*, 22d July 1687. But those who stop a poinding either by collusion or by violence are liable criminally in the penalties of deforcement, and they are also liable to the party for the value of the goods poinded; *Gordon v. Manderston*, 10th and 23d June 1724. The

debtor cannot stop the pointing by raising an action of multiple-pointing of the pointed effects; *Hendry v. Brown*, 6th June 1851. If payment is not made, and no third party appears, the messenger adjudges, decerns, and declares the pointing to be completed, and the goods to belong to the creditor.

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13 D. 1046.

By 1 and 2 Vict. cap. 114, § 23, the messenger must, if required, before the pointing is completed, conjoin in it any creditor who delivers to him a warrant to point, which he does by mentioning the fact in his execution. And the same section declares one valuation by two valutors to be sufficient. By subsequent sections, the pointed effects are to be left where pointed,* and a schedule delivered to the possessor, specifying the articles, the name of the pointer, and the value. Within eight days, or upon cause shewn, if later, the officer must report the execution to the sheriff, specifying the diligence, the names and designations of debtor and creditor, the effects, the value, the valutors, the possessor, and the delivery of the schedule to him. The execution reported is to be subscribed by the messenger and the valutors, who are to be witnesses to the pointing without the necessity of other witnesses. The sheriff is then to give orders, if necessary, for the security, and, if they are perishable, for the immediate disposal of the pointed goods. If they are not summarily sold, the sheriff grants warrant for a sale by public roup, when and where he shall appoint, of which sale he names a judge, not sooner than eight, or later than twenty days, after publication of the notice of sale, and six days' notice of the sale must be given by serving a copy of the warrant upon the debtor or other possessor. The upset price must not be less than the appraised value, and, if no offerer appear, the goods, or such a portion as at the appraised value will pay the debt, interest, and expenses, is delivered by the judge to the pointing creditor and any conjoined creditor, subject to the claim of other creditors to be ranked as by law competent. Within eight days the judge of the roup must report to the sheriff the sale or delivery, and, if the effects have been sold, he must lodge with the sheriff-clerk the roup-rolls or certified copies thereof, and an account of the proceeds and expenses. The sheriff may order the proceeds to be consigned with the clerk, and the amount must, by order of the sheriff, be paid to the pointing and conjoined creditor to the extent of their debts, interest, and expenses, but subject to the claims of other creditors to be ranked as by law competent. The report and

CONJUNCTION
OF OTHER
CREDITORS IN
THE POINTING.REPORT OF
POINTING.SALE OF THE
POINTED GOODS.REPORT OF
SALE.

* Pointing of Crown-debtors' effects is carried through in ordinary form, "except that it shall be lawful for the officer executing such pointing, where it is deemed expedient, to take possession of the pointed effects, and to place them in a place of security, instead of leaving them with the person in whose possession they were pointed; and on the execution of pointing being reported, the Sheriff shall grant warrant to the Sheriff Clerk to sell them in common form;" 19 & 20 Vict. c. 56, § 36.

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INTROMITTERS
WITH POINDED
GOODS.

documents are patent to all concerned. By § 29, the poinder, or other creditor, may purchase at the sale. Any one unlawfully intromitting with, or carrying off, the poinded effects, may be summarily punished by imprisonment, or payment of double the appraised value. And the Act is declared not to affect the hypothec of the landlord or others.

DECISIONS AS
TO THE IMPORT
OF THE FORMS
USED IN POIND-
ING.

There have been various decisions upon the import of these new forms, and several decisions, which will also apply to them, have been pronounced upon similar regulations contained in the former bankrupt Act. These, along with others, we shall notice in the order of the procedure.

1. AS TO RE-
QUISITES OF
THE APPRAISE-
MENT.

13 S. 342.

3 S. 311.

2. AS TO
REPORT OF
POINDING.

13 S. 483.

3. AS TO FIXING
SALE.

5 D. 860.

3 D. 554.

4. AS TO RE-
PORTING THE
SALE.

F. C.

1 S. 407.

p. 20.

TRANSFER OF
GOODS, WHEN
COMPLETED?

The appraisement must be articulate, and the poinding was held to be invalid where a trunk and its contents were appraised in one sum, and the articles contained in them, which were of different kinds and values, were not separately appraised; *Macknight v. Green*, 27th January 1835. The appraisement does not require to be stamped, unless licensed appraisers be employed and their appraisement taken in writing, which is not necessary; *Drummond v. Kerr*, 25th November 1824. The requirement to report within eight days after the poinding will be strictly enforced, unless good cause for the delay be shewn. Under the old bankrupt Act, 54 Geo. III., cap. 137, the enactment was to report "forthwith," no number of days being specified; and in *Miller v. Stewart*, 17th February 1835, a poinding was found to be null, because not reported until sixteen days after it was made. The Sheriff *must* exercise the discretion committed to him, by fixing the time and place of sale; and, where a warrant was granted to sell within a month from the date of the Sheriff's interlocutor, that was held to be illegal, as not in compliance with the requirements of the Statute; *Kewly v. Andrew*, 8th March 1843. In reckoning the eight days which must elapse between the publication and the sale, one of the two days upon which these acts take place may be included; and so it was held sufficient compliance, when the sale was appointed for the 18th November, that it was advertised upon the 10th; *M'Neill v. M'Murphy, Ralston, & Co.*, 13th February 1841. The rule was different under the previous practice, but then the time required was eight *free* days, which expression excluded the day both of publication and of sale. The poinding is not completed, nor is the property transferred to the poinding creditor, until the sale is past, and the report lodged with the Sheriff Clerk; *Tullis v. White's Trustees*, 18th June 1817; *Samson v. M'Cabben*, 15th May 1822. It is proper, however, to keep in view, that Mr. Bell, in his Commentary upon the Diligence Act, doubts the effect of these decisions, as postponing the transference until after the sale, and holds, on the authority of the Act of Sederunt, 14th December 1805, and of the terms of the messenger's execution, that the transfer is effected by

the messenger's adjudication. Delay in reporting the sale renders the pouncing inept; *M'Ghie v. Mather*, 1st December 1824. This decision applied to the Act, 54 Geo. III. cap. 137, but in it the provision on this head was the same as in the recent Statute. The pouncing creditor, however, will not be made to suffer on account of delays for which he is not answerable; *Scoullar v. Campbell & Co.*, 27th May 1824. PART II.
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3 S. 339.
3 S. 77.

Before the recent Statute, 1 & 2 Vict. cap. 114, it was held, generally, that the Sheriff's power in poundings is merely ministerial, and only entitles him to take cognizance of objections arising as to the *ex facie* regularity of the diligence, the liability of particular articles to be pounded, or the like, but not to decide any objections as to the justness of the debt, or the title of the party to have obtained the diligence. This doctrine was delivered in *Clark v. Clark*, 15th June 1824. Under the new forms, however, he is, by § 26, empowered to judge of any lawful cause which may be shewn why the pounded goods should not be sold. POWER OF
SHERIFF IN
POUNDINGS.
3 S. 143.

If, after taking steps to recover his claim by pouncing the debtor's effects, a creditor finds that another creditor has got the start of him, and either has completed, or will be able to complete, his diligence before him, then his object must be to obtain a share of the effects; and this can be accomplished in two ways:— MODES OF
EQUALIZING
COMPETING DILI-
GENCES.

(1.) He may do such personal diligence against the debtor as will render him notour bankrupt, according to the rules prescribed by the Act 1696, cap. 5, if he is in this country; but if he is abroad, then he may be rendered bankrupt by any of the steps of diligence prescribed in the 1st section of 54 Geo. III. cap. 137; by the 5th section of which statute it is enacted, that no pouncing used within sixty days before, or four calendar months after, the bankruptcy, shall give a preference, but every creditor of the bankrupt having liquid grounds of debt or decrees for payment, and summoning the pouncer, or claiming in a judicial process or competition before the four months have elapsed, shall be entitled to a share proportionate to his debt, the pouncer being entitled preferably to his expenses. 1. BY MAKING
DEBTOR NOTOUR
BANKRUPT.

(2.) If the creditor is in a condition to obtain a sequestration of the debtor's estates under 2 & 3 Victoria, cap. 41, § 83, that renders ineffectual any pouncing executed on or after the sixtieth day before the sequestration. 2. BY SEQUE-
STRATING THE
DEBTOR.

The practitioner must also be on his guard in the event of the Crown having any claim against the debtor. The Queen's diligence by writ of extent gives to Her Majesty first execution before any other person, if the Crown's suit be commenced before judgment given for the subject. This is the rule in England by the 23 Henry VIII. cap. 39, § 74; and by analogy the Crown writ prevails in Scotland over the diligence of the subject, unless the latter be completed COMPETITION
WITH THE
CROWN.

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ii. Com. 54.

of a date prior to the issuing of the extent. The Judges are bound to give the subject every fair facility in competing with the Crown, and a case will be found noted by Mr. Bell, where a commission was brought to Lord Chancellor ELDON in the middle of the night to be sealed, with the avowed object of preventing an extent, (which would have been preferable, unless the commission were of a prior date,) and his Lordship, considering it to be his duty to hold an even hand between the Crown and the subject, without reference to the purpose, got out of bed and sealed the commission.*

DISTINCTION
BETWEEN AR-
RESTMENT AND
POINDING.

ARRESTMENT
BOTH A PRE-
SERVATIVE
DILIGENCE AND
A DILIGENCE IN
EXECUTION.

4. *Arrestment*.—Poinding is a diligence in execution only, and it cannot proceed without a previous decree of registration either by consent, or pronounced in a suit. It cannot, therefore, be used as a security to preserve the debtor's moveables for the creditor during the discussion of the claim. There are also some kinds of property which cannot be attached by poinding, such as obligations to pay money to the debtor. These cannot be poinded, because they are not corporeal moveables. In both of these respects, as well as in some others, the creditor has a remedy by the diligence of arrestment. To arrest is to stop, or stay. By this proceeding, there is detained the fund which is owing, or the moveables which belong, to a debtor in the hands of the third party† upon whom the arrestment is served, so that he is debarred from paying or delivering to the debtor, while the arrestment remains in force. If the debt is not constituted by a decree, the fund is thus preserved during the discussion, and will be available when decree is obtained. If, again, the debt is already constituted, then the arrestment is a step, by which, and by the measures consequent for giving effect to it, the arrested fund may be applied in liquidation. Arrestment thus combines the two characters, first, of a preventive or preservative diligence; and secondly, of a diligence in execution. It is imposed, like every other fetter upon

* "In all questions of preference or competition, the execution of any charge at the instance of or on the behalf or for behoof of the Crown; and, in the case of deceased Crown-debtors to whom no such charge has been given in their lifetime, the execution of any arrestment or poinding at the instance of or on the behalf or for behoof of the Crown, shall be deemed and taken to be equivalent in all respects to the *teste* of a writ of extent according to the existing law and practice;" 19 & 20 Vict. c. 56, § 42.

† By the Mercantile Law Amendment Act, it is made competent for a party to poind or arrest in his own hands. That statute, 19 & 20 Vict. c. 63, provides, that, when goods are sold but not delivered, they shall not be attachable by the seller's creditors, and the seller shall not be entitled to retention generally against a purchaser from the original purchaser, but must, on intimation of the subsequent sale, hold for the second purchaser. But, by § 3, "any seller of goods may attach the same, while in his own hands or possession, by arrestment or poinding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or poinding shall have the same operation and effect in a competition or otherwise, as an arrestment or poinding by a third party."

the use of property, by the authority of a Court. The party in whose hands the fund or goods are arrested, is called the arrestee; the creditor is called the arrester; and the creditor's debtor, because he is debtor also to all those who by use of arrestment or other diligence may attach the fund, is called the common debtor.

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The warrants of arrestment correspond to its respective objects, as a diligence for preservation, or a diligence in execution.

WARRANTS FOR
ARRESTMENT.

Arrestment in Security.—If the claim is not liquid—that is, constituted by bill, or bond, or decree—the creditor institutes a summons against the debtor, founded upon the claim, and concluding that he should be decerned and ordained to pay the amount with interest and expenses. A judicial demand being thus raised, arrestment may be used *on the dependence*—that is, to stay the arrestee from paying while the claim is under discussion. A summons merely raised and signeted is a ground for arrestment on the dependence. Formerly it required, as stated by Erskine, to be executed, before arrestment could be used, but the bankrupt Acts, 33 Geo. III., and 54 Geo. III., allowed arrestment before execution of the summons; and, by the Personal Diligence Act, § 17, it is competent to arrest before executing, until caution be found. But the arrestment is null, unless the summons be executed and called in Court within a limited period specified. Formerly, the warrant of arrestment upon the dependence consisted of separate letters of arrestment; but, by the 16th section of the recent Diligence Act, a warrant to arrest may be inserted in the summons itself. Arrestment on the dependence is competent at any period of the litigation, including the appeal to the House of Lords; *Hadinton v. Richardson*, 8th March 1822. The diligence in this form has a peculiar use for securing moveables in this country during the dependence of a litigation abroad. Arrestment is competent upon the dependence of an action brought avowedly only for the purpose of obtaining security by the use of this diligence during the dependence of a suit in Chancery in England; *Fordyce v. Bridges*, 2d June 1842. When the warrant is separate, and equally when it is contained in the summons, objections on the score of vitiation must be carefully avoided. “Writs of diligence,” in the words of Lord Jeffrey, “are edge tools which ought to be handled with delicate scrupulosity; and, if the property or person of another is to be attached under them, they ought to be of a nature beyond the reach of question.” In *Forbes v. Gallie*, 4th March 1847, an arrestment was held ineffectual, because in the letters the word “dependence” in narrating the deliverance upon the bill was written upon an erasure; and, as this decision was given even in a case where the terms of the deliverance itself might have been held as a guarantee for the accuracy of the superinduced word, it must be expected, that,

ARRESTMENT
ON THE DEPENDENCE,
WARRANT FOR.

Inst. iii. 6, 3.

1 S. 387.

4 D. 1334.

Vide supra, p. 290.

9 D. 806.

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ARRESTMENT
*ad fundandam
jurisdictionem,*
WARRANT FOR.

when the warrant is granted *de plano* in the summons itself, the most severe rules of interpretation will be applied.

F. C.
2 S. 672.

8 D. 952.

In pecuniary claims, where the debtor is a foreigner, in order to subject him to the authority of the Court, the creditor must begin by placing the debtor's property under its control, which is done by separate letters of arrestment *ad fundandam jurisdictionem*. This is a necessary preliminary to, and lays the foundation for, the summons against the debtor, by making him amenable to the jurisdiction of the Court of Session, in which alone an action against a foreigner is competent; *Bertrams v. Barry and Bruce*, 6th March 1821; *Houston v. Stirling*, 3d February 1824. After the summons is raised, the creditor executes arrestment on the dependence. This is done, in order to a distinct attachment of the fund in security of the debt, although it has already been attached in order to create a jurisdiction. In *White v. Spottiswoode*, 30th June 1846, an opinion was stated from the Bench, that the arrestment *ad jurisdictionem fundandam* imposes a *nexus* upon the arrested property; but the prudent Conveyancer will, notwithstanding, continue to observe the established practice.

15 D. 202.

Arrestment *jurisdictionis fundandæ causâ* is unnecessary in the process of multiplepoinding, the existence of a fund *in medio* being equivalent to such arrestment. Authorities for this will be found cited in *Crockart v. The Dundee and Arbroath Railway*, 9th December 1852.

ARRESTMENT
IN SECURITY,
WHERE DEBTOR
*vergens ad
inopiam.*

M. 813.

F. C.

There is another case of arrestment in security, viz., where a creditor has a liquid ground of debt, as a bill or bond, but the term of payment has not arrived. Upon such a document he can obtain letters of arrestment, when the debtor is *vergens ad inopiam*. He presents the ground of debt in the Bill-Chamber, and obtains a warrant for letters of arrestment, which proceed upon a narrative of the ground of debt, and that the debtor is daily squandering and disposing of his means and effects, whereby he has become *vergens ad inopiam*, and the will or warrant is to arrest the debtor's moveable goods and gear, debts, and sums of money, &c., to remain under arrestment "until sufficient caution be found acted" (that is, made or granted) "in the books of Council and Session, that the same shall be made forthcoming to the complainer." The general rule is, that arrestment to secure a debt payable at a future time is competent only when the debtor is *vergens ad inopiam*; *Pitmedden v. Patersons*, 17th July 1678. In the case of *Macdonald and Elder v. Macleod*, 15th January 1811, however, it was held by some of the Judges, that the creditor in an annuity may secure the future termly payments by a present arrestment, the decree of furthcoming operating as an adjudication for a contingent debt. But the Court was much divided, and as no judgment was pronounced, the doctrine could not be relied on in practice.

Arrestment in Execution.—Lastly, we have arrestment in execution—that is, a detention of the fund in the arrestee's hands, with a view to its immediate payment to the arrester, upon his shewing that the common debtor owes him so much.

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Arrestment in execution may be imposed

WARRANTS FOR
ARRESTMENT IN
EXECUTION.

(1.) By special letters of arrestment. These are obtained upon warrant from the Bill Chamber upon a liquid ground of debt, registered or unregistered; and the warrant is to arrest the debtor's goods, &c., to remain under arrestment, not until caution be found, which is proper only to arrestment in security, but until the claimer be completely satisfied and paid his debt, principal and interest. Besides the ordinary warrant, the will may contain a warrant to arrest in the hands of persons furth of Scotland.

(2.) Letters of horning and poiding contain, as we have seen, a warrant of arrestment.

(3.) Under the 1 & 2 Victoria, cap. 114,* the warrant appended to the extract decree is (§ 1) a warrant to arrest, upon which (§ 2) arrestment may be used, in like manner as if letters of arrestment, or horning containing warrant to arrest, had been issued under the Signet. By the other sections of the Act already referred to, the same provision is made with regard to the decrees of the Sheriff, and for arrestment at the instance of parties acquiring right to the extracts. Upon letters of horning, and consequently upon the extract decree under the new forms, arrestment may be used before giving a charge; *Weir v. Falconer*, 2d February 1814.

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Arrestment is ordinarily executed by the messenger or officer serving upon the arrestee a copy or schedule, by which, in virtue of the warrant, he fences and arrests in the arrestee's hands a specified sum owing by him to the debtor or to others for his behoof, with all goods, gear, debts, money, and moveable effects in the arrestee's hands belonging to the debtor, to remain under arrestment at the instance of the creditor, until he be satisfied and paid, or, as the case may be, until caution be found. Of this service an execution is returned. The requisites of execution, as regards the place and manner of service, and the form and essentials of the copy and execution, we have already examined.

MODE OF EXECUTION OF ARRESTMENT.

In one case, viz., in the arrestment of ships, the execution is not personal, but by direct attachment of the thing. This, and not poiding, is the proper diligence for attaching ships in security or in execution. The ordinary warrant in a summons is sufficient to arrest a ship, without special warrant from the Lord Ordinary on the bills to arrest maritime subjects; *Clark v. Loos*, 17th June 1853. The arrestment is made by affixing the copy to the mainmast, and chalk-

ARRESTMENT OF SHIPS.

* See also the Court of Exchequer Act, §§ 28, 30, which contains similar provisions.

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F. C. ing above it the Royal Initials. If the ship be still on the stocks, it may be arrested there, and the copy in that case is affixed to the stern. The competency of arresting an unfinished ship is shewn by *Mill v. Hoar*, 18th December 1812. The messenger and his cautioner are responsible for injury resulting from improper execution, as in *Kennedy v. M'Kinnon*, 13th December 1821. It is competent to arrest a ship, so as to detain it for a debt owing by one who is only part owner; *M'Aulay v. Gault*, 6th March 1821.

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IN WHOSE
HANDS ARREST-
MENT MUST BE
USED.

Stewart's
Answers to
Dirleton, p. 10,
 voce "ARREST-
MENT."

M. 743.
2 S. 505.

In other cases, the execution of arrestment, as we have seen, is personal; but it is incompetent to arrest in the hands of the debtor himself. The arrestee must be a party indebted to the debtor,* as the purchaser of an estate, in whose hands the price may be arrested at the instance of the creditors of those to whom or for whose behoof he is bound to pay it; *Creditors of Bonjedward*, 24th November 1753. And, in *Macfarlane v. Forrester*, 20th November 1823, the price of a tenant's stock, which had been sold under the landlord's hypothec, was held to have been competently arrested in the hands of the commissioner who conducted the sale by a creditor of the tenant, subject to the landlord's claim. Where the partner of a company is in debt to the company, a creditor of the company may arrest, in such partner's hands, the funds owing by him; *Hill v. The College of Glasgow*, 13th November 1849. The debt here consisted of railway calls due by a shareholder in a railway company. But care must be taken, in selecting the arrestee, to fix upon a party who is directly indebted to the common debtor. It is not sufficient, for instance, to arrest in the hands of the factor of a party who owes a sum to the common debtor, because the factor is accountable not to your debtor, but to the debtor of your debtor. Upon this principle, arrestment in the hands of trustees for a party owing a sum to the common debtor was held ineffectual; *Campbell v. Fairkney*, 12th December 1752. As arrestment is competent against the debtor in the hands of a party indebted to him, so after his death the same diligence may be used by the creditor to attach funds owing to those bound to represent him in his liabilities; *Globe Insurance Company v. Scott's Trustees*, 16th February 1849, affirmed 14th August 1850. In this case, arrestment, used by a creditor on the dependence of an action against the executors confirmed of his debtor, which action was brought after the lapse of six months from the debtor's death for the purpose of securing a debt given up in the inventory of the deceased's estate, was held to give the arrester a preference over other creditors who had only cited the executors. In the report, the distinction will be found pointed out between a trust for creditors and a testamentary trust. A trustee for creditors holds for behoof of all, and all are under obligation to recognise his management, and are, there-

12 D. 46.

M. 742.

11 D. 618.

7 Bell's App.
296.

* See *supra*, note †, p. 302.

fore, excluded from disturbing it. The executor, on the other hand, holds not as a trustee, but as representing the deceased, and so is liable to diligence as he was.* When a party is incapable of acting for himself, the arrestment will be laid in the hands of his guardian. It has been held sufficient, however, to execute arrestment against a minor above pupilarity, without service upon his curators; *Robertson* M. 2184. v. *Ker*, November 1687. But in practice it will be prudent to arrest in the curator's hands also. Arrestment in the hands of two trustees, the whole body being six in number, is inept; *Black v. Scott*, 22d 8 S. 367. January 1830.

Mr. Erskine indicates an opinion, that it is incompetent to arrest a debtor's effects abroad, the possessor not being within the jurisdiction. But he afterwards notices a case, in which the validity of an edictal arrestment was sustained. By the bankrupt Act, 54 Geo. III. cap. 137, § 3, it was expressly enacted, that arrestment in the hands of a party furth of Scotland does not interpel him from paying to the original creditor, unless it be proved that he was in the knowledge of the arrestments. The intention of this enactment was to protect a debtor abroad, who should ignorantly pay *bond fide*, notwithstanding the arrestment. In order to security, it is very advisable, when arrestment is used edictally, to notify it to the agent of the arrestee. But such notice is not essential, and it does not confer a preference over a previous arrestment regularly executed without notice; *Syme & Stewart v. Anderson*, 7th December 1824. Arrestments against parties abroad are to be made by delivery of the schedule at the office of the Keeper of Edictal Citations, in the same manner as charges; 1 & 2 Vict. cap. 114, § 18; *Act of Sederunt*, 24th December 1838.

The same principle which has provided indemnity by statute to foreign debtors who shall pay in ignorance, has been admitted by our Courts in defence of parties in this country; and where, after arrestment had been used, payment was made to the creditor himself,

* By the recent Court of Exchequer Act, 19 & 20 Vict. cap. 56, § 36, it is made competent, "notwithstanding the death of any person indebted to the Crown by bond or other obligation on which diligence may competently proceed, or under any extract decree decerning for payment of any penalty, duty, or debt to Her Majesty, to proceed against the estate and effects of such debtor by arrestment, and also by poinding; and it shall not be necessary, in order thereto, to cite or charge the executor or other representative of such debtor, or to take any proceeding against such executor or representative; but it shall be competent to register such bond or other obligation after as before the death of the debtor, and to obtain an extract of the decree proceeding upon such recorded bond or obligation, containing warrant to execute diligence in the like terms as during the lifetime of such debtor; and on an affidavit by any person to the effect that such debtor is deceased, it shall be lawful for the sheriff, without the form of any previous charge, to cause arrest at once upon such extract, registered bond, or obligation or extract decree in the hands of any person indebted or supposed to be indebted to the deceased, and also to poind the whole moveable effects of the deceased, in the like manner and to the same effect in every respect as if the deceased were still in life, and had been duly charged, and the charge had expired."

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2 Rob. App.
490.

16 S. 367.

ARRESTEE
MUST BE IN
POSSESSION.

M. 745.

M. voce "Ser-
vice and Con-
firmation,"
App^r. No. 3.

M. 736.

13 D. 149.

M. 761.

Hume, 29.

Hume, 31.

5 Br. Supp. 878.
14 D. 821.WHAT PRO-
PERTY ARREST-
ABLE.

in circumstances where it was not possible that the arrestee could know of the arrestment, he was held not liable in second payment; *Laidlaw v. Smith*, 26th October 1841, affirming the decision in the Court of Session, 25th January 1838.

The arrestment will not be effectual, if the arrestee be not in possession of the debtor's property, when it is executed. Accordingly, arrestment in the hands of a consignee, used before arrival of the goods, was found inept; *Stalker v. Aiton*, 9th February 1759. And arrestment by the creditor of a deceased party in the hands of the next of kin will be unavailing, if used before their title to the property is completed by confirmation; *Atkinson, Mure, & Boyle v. Learmonth*, 14th January 1808. The possession of the arrestee must be a *bonâ fide* and complete custody; and so, when two parties occupied separate portions of the same cellar with their respective goods, arrestment in the hands of one of them for the debt of the other was disallowed, because he was not custodier, or in any proper sense a possessor of the other's property; *Hunter v. Lees*, 19th January 1733. A party having abandoned his domicile in this country, and granted a mandate to his law-agent to take charge and dispose of the furniture and effects in his house, that was held to be possession on the part of the agent, sufficient to validate arrestments in his hands at the instance of a creditor of his constituent; *Brown v. Blaikie*, 26th November 1850. The tenant of a furnished house does not possess it in such a character as to make the furniture arrestable in his hands; *Davidson v. Murray*, 11th December 1784. In such circumstances, it was here held, that pouding was the only proper diligence. Upon the same principle it was held that carts and horses belonging to a company of carriers were not competently arrested in the hands of a clerk to the company, although the stable containing them was taken in his name; *Burns v. Bruce & Baxter*, 27th February 1799; and a pouding prevailed here over a previous arrestment. Baron Hume also reports the case of an attempt to arrest a horse standing in a smithy to be shod, by serving the copy on the smith; but the Court held there was no possession, and the custody too transient to form the ground of arrestment; *Neilson v. Smiths, &c.*, 20th February 1821. The competency of arrestment of grain in the hands of the miller, and of arrestment in various other cases of possession merely temporary, is discussed in *Cunningham v. Home*, 17th November 1760; and, in *Hume v. Baillie*, 29th May 1852, a horse was held not arrestable in the hands of an innkeeper, the master being a guest in the inn, or in the hands of a friend whom the debtor is visiting.

The next question is—What property is arrestable? and the answer is generally—the whole moveable property to which the debtor has right, whether it consists of sums payable to him, or of moveables or goods belonging to him, provided always that these are in the hands

of third parties.* Personal bonds containing a clause of interest, which, as we have seen, were at first heritable, could not formerly be arrested. But the Act 1661, cap. 51, declares all sums owing by bonds, contracts, and other personal obligations arrestable, if not followed by infestment, although bearing payment of annual-rent. Under this statute, the sum in a heritable bond has been found arrestable, although infestment had been taken, because the sasine was not registered, and unregistered sasines are null in relation to third parties; *Stewart v. Dundas's Creditors*, 20th February 1706. M. 705. The proceeds and price of heritable property in the hands of trustees are arrestable, whether held by them for creditors, as in *Grierson v. Ramsay*, 25th February 1780; or for legatees; *Douglas v. Mason*, M. 16,213. 29th June 1796; *Pindar v. Davidson, &c.*, 27th May 1824. The sum in a policy of insurance is arrestable during the life of the party insured, and, if he dies before another premium falls due, the attachment is effectual; *Strachan v. M'Dougle*, 19th June 1835. Here the question, whether the arrestment would subsist after payment of another premium, was reserved.

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While the general rule is, that all the debtor's moveable property is attachable by arrestment, we must except such funds as had, previously to the arrestment, been competently applied or destined to a particular purpose, which the arrestment would defeat. Thus, where money belonging to a trust had been consigned in bank, it was held primarily applicable towards payment of the expenses of the trust-management, and the Court would not allow that purpose to be defeated by an arrestment at the instance of one of the trustees for a debt owing to himself; *Wight's Trustees v. Allan*, 12th December 1840. In like manner, money consigned, in order to be applied to the redemption of a wadset, was held not arrestable by a creditor of the consignee; *Mackenzie v. Tuach*, 22d June 1739. But, after the wadset has been declared to be dissolved, the money being no longer subject to the purpose of consignment, arrestment becomes the proper mode of attachment, and was preferred to inhibition in *Stormonth v. Robertson*, 24th May 1814. Upon the same principle, alimentary funds cannot be arrested, being destined by their constitution to a particular purpose; and it has been held, that an income of £1800 provided to a peer is not beyond the limits of what can be declared alimentary, so as to exempt it from diligence; *Harvey v. Calder*, 13th June 1840. And an alimentary annuity of £200 to the second son of a lady of property has been found not arrestable; *Smith v. Bell & Innes*, 29th May 1855. King's pensions, being designed for aliment, are not arrestable, though not declared to be alimentary; *Dick v. Dick*, 22d December 1676. For the same reason, and in terms of various acts of Sederunt, the salaries of Judges in the Court of

FUNDS SUBJECT
TO SPECIAL
DESTINATION
NOT ARREST-
ABLE.

ALIMENTARY
FUNDS, &c.,
NOT ARREST-
ABLE.

* See *supra*, note †, p. 302.

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F. C.

BILLS OF EX-
CHANGE NOT
ARRESTABLE.
F. C.

FUTURE DEBTS
NOT ARREST-
ABLE.

M. 4860.

M. 769.

M. 767.
See *supra*, p.
205.

9 D. 1354.
TERM-DAY.

M. 15919.

Session are not arrestable. Servants' fees cannot be arrested, excepting in so far as they exceed what is requisite for their proper maintenance. And by 1 Victoria, cap. 41, § 7, the wages of labourers and manufacturers, so far as necessary for their subsistence, are declared alimentary, and not liable to arrestment. A minister's stipend is arrestable; *Smith v. Earl of Moray*, 13th December 1815. Bills of exchange, which, like bags of money, pass from hand to hand, and have the privilege of freedom of currency, cannot be arrested in the hands of an indorsee; *Dick v. Goodall & Co.*, 1 June 1815.

Future debts are not arrestable—that is, those in regard to which the obligation to pay has not yet arisen. But this rule does not extend to debts for which the obligation is already perfect, although the term of payment have not arrived. Thus, the principal sum in an obligation may be arrested before the term of payment, because it is due, although not yet payable; but the interest to become due at a term not yet current is not arrestable, because it is neither payable nor due. It is no objection to an arrestment, that the sum arrested is under litigation, and will not be due if the arrestee succeed in the suit; because this is not a future debt, the arrestee, if subjected in payment, being liable not from the date of the future decree, but from the time when the decree shall ascertain the debt to have become due; *Wardrop v. Fairholm*, 19th December 1744. Under this rule, by arresting the interest of heritable debts and the rents of heritable property, a creditor attaches only such interest as may be in arrear, and that which has begun to accrue for the current term, and will be payable upon the next term day; *Livingston v. Kinloch*, 10th March 1795. From this case it will be found, that arrestment of rents used after Martinmas attaches the current rent payable at the following term of Whitsunday. The same principle was applied to annuities in the case of *Corse v. Masterton*, 31st January 1705, although, had the annuitant died before the term, nothing might have been due for the current term. When an annuity is payable weekly, arrestment covers the arrears, and the sum payable for the current week; *Smith and Kinnear v. Burns*, 23d June 1847. The term-day is the last day of the half-yearly term, and, therefore, arrestment used on the 15th of May does not affect the rent payable at the ensuing Martinmas; *Wright v. Cunningham*, 23d June 1802. Here arrestment used on 11th November was found not to attach the rent payable at Whitsunday next, because the whole term-day must elapse before the currency of the new term commences. The effect of arrestments depends upon the legal term at which the rent would be payable, if the payment were regulated by law and not by agreement; and so, if one arrest the term's rent which is current according to the legal rule, it is effectually attached, although by lease or agreement it be not payable at the legal term, but at a later period, the effect of the agree-

ment, as regards the arrester, being merely that he cannot require payment until the conventional term has arrived; *Handyside v. Corbyn and Lee*, 15th January 1813.

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The general effect of arrestment is, that it creates an inchoate attachment in favour of the arrester over the arrested fund and interest accruing on it. Ulterior steps are requisite to convert this attachment or restraint into a direct application towards satisfaction of the arrester's claim, but in the meantime there is a tie created in his favour.* The fund is, in legal phrase, rendered litigious—that is, the subject of legal discussion, and the arrestee is liable, if in the face of the arrestment he pay to the common debtor. After the arrestee's death, his heir is not bound to know of the arrestment, and will not, therefore, be liable if he pay in ignorance of it. But the *nexus* created by the diligence still subsists to this effect, that the creditor upon an arrestment in the hands of a deceased party may sue his representative to make the fund furthcoming, and a creditor in this position is preferred, on account of his priority of date, to one who arrests in the hands of the representative; *Earl of Aberdeen v. Scot's Creditors*, M. 774. 22d December 1738. The arrestment subsists also after the death of the common debtor. It is true, that, by decisions reversing the doctrine previously established by a series of judgments, one who obtains confirmation as executor-creditor of the common debtor, is preferable to a party who had arrested before his death; *Wilson and M'Lellan* 2 S. 430. v. *Fleming*, 26th June 1823. But this is not because the *nexus* of the arrestment is dissolved by death, but because confirmation is held, like poinding, to be a more perfect diligence than arrestment.

EFFECT OF AR-
RESTMENT IN
CREATING A
nexus.

In order to complete this diligence, there is required a legal process FURTHCOMING. to obtain the order of a Judge upon the arrestee to make payment to the arrester. This is called the process of furthcoming, which is competent in any Court. It is directed by the arresting creditor against the arrestee; and, as he must in this process establish his right to the fund, by proving that he is a creditor of the common debtor, the latter must also be made a defender. The arrestee may state all objections to the regularity of the arrestment, but he is not entitled to resist upon grounds relating to the validity of the debt; *Houston v. Aberdeen Town and County Bank*, 20th July 1849. The latter are the defences of the common debtor, and, if he succeeds in establishing

* By the recent Court of Exchequer Act, it is made lawful for the sheriff, by virtue of the extract decree, to cause arrestment to be used thereon in the hands of any person in common form, "and such arrestment shall operate to *transfer to the Crown*, preferably to all other "creditors of the crown-debtor, all right to and interest in the arrested fund, competent to "the crown-debtor." The arrestee is entitled to pay without abiding the institution of a furthcoming; it being competent, however, to the Crown, in the event of payment not being made, to follow up the arrestment by a furthcoming, and to pursue, and do diligence against, the arrestee, as if the Crown stood specially assigned into the debt due by him to the Crown-debtor; 19 & 20 Vict. cap. 56, § 30.

PART II. them, there can be no decree of furthcoming. Where the arrestment
 CHAPTER IV. has been used upon a depending action, the expenses of that action
 4 S. 76. are covered by it; *May v. Malcolm*, 7th June 1825. The same case
 shews, however, that the expenses of the furthcoming are not covered.
 When the arrested fund consists of money, the decree of furthcoming
 ordains payment of it to the arrester. When goods have been arrested,
 it ordains a public sale and payment of the price to the arrester. In
 either form the judgment constitutes perfect diligence and a com-
 pleted right in favour of the arrester; *Muirhead v. Corrie*, 17th
 M. 687. February 1735.

RECALL OF AR- Within the limits of these Lectures it is impossible to embrace the
 RESTMENTS. whole subject of arrestment. We have now examined the points
 which most nearly concern the Conveyancer, as bearing upon the
 power of making obligations effectual through the medium of this
 diligence. Upon the subject of loosing arrestments upon caution,
 1 & 2 Vict. therefore, it is necessary merely to refer to sections 20 and 21 of the
 c. 114. Personal Diligence Act, whereby the Lord Ordinary, subject to re-
 view, and the Sheriff, are empowered to recall and restrict arrestments;
 and as arrestments are in practice frequently withdrawn by private
 F. C. arrangement, it is necessary that the practitioner should be aware of
 the decision in *Ewing, May, & Co. v. Johnstone*, 9th December 1813,
 where it was held, that an arrestment had been effectually recalled
 by a letter written under false impressions, and that it could not be
 founded upon in competition with a posterior arrester not chargeable
 with misleading the other. The rules as to the loosing of arrestments,
 the finding of caution, and the breach of arrestments, will be found
 in Erskine's Institutes, B. iii. tit. 6, §§ 12, 13, 14.

COMPETITION OF With regard to the preference of arrestments *inter se*, the criterion
 ARRESTMENTS is priority in point of time, in illustration of which it is enough to
inter se. refer to the cases of *Cameron v. Boswell*, 28th February 1772, where
 M. 821. an arrestment bearing execution between the hours of six and seven
 was preferred to one served between seven and eight of the same
 M. 823. afternoon; and *Wright v. Anderson*, 28th January 1774, where of
 two competing arrestments, the one having been executed between
 five and six, and the other between five and seven, the Court held,
 that there was no evidence of priority, and preferred the claimants
pari passu. It is not prudent to delay the furthcoming, because a
 long delay is held to imply a relinquishment of the diligence; and,
 M. 824. although in the case of *Lister v. Ramsay*, 25th July 1787, a prior
 arrestment was sustained, though not followed out for three years,
 the objection of *mora* ought to be carefully avoided, and is the more
 1 & 2 Vict. hazardous now, since by the Personal Diligence Act, § 22, the pre-
 c. 114. scription of arrestments, which was previously five, is now limited to
 three, years, to be reckoned in future or contingent debts from the

time when the debt becomes due and the contingency is puri-
fied.

We have already, in treating of the assignation, adverted to the rules of preference between that conveyance and arrestment. Intimation, by completing the assignee's right, gives him preference over subsequent arresters. Where the intimation and arrestment are of the same date without an hour specified they are ranked *pari passu*, because there are no elements for determining priority.

When a creditor is anticipated by arrestment at the instance of another creditor, the remedy is either poiding, if it can be carried through before decree of furthcoming, or a mercantile sequestration within sixty days of the arrestment, in terms of the 83d section of 2 & 3 Vict. cap. 41. Decree of furthcoming has no effect in making arrestment effectual, if notour bankruptcy follow within sixty days of the arrestment; *Dobbie & Co. v. Nisbet*, 30th May 1854. 16 D. 881. Arrestment is also excluded by an English commission of bankruptcy against the debtor; *Strother v. Read*, 1st July 1803; and also by a commission of bankruptcy issued in America; *Maitland v. Hoffman*, 4th March 1807.

In conclusion, I have only again to refer such as may desire fully to investigate the origin and nature of the different steps of diligence, to Mr. Ross's Lectures; and those who wish for minute and accurate information regarding the details of the practice, will find it in Mr. Darling's work on the powers and duties of messengers-at-arms and other officers—a treatise compiled with much care.

We have now completed that portion of our work which embraces the creation and use of personal obligations by bond. We have seen how the obligation is constituted, and the bond framed—traced it into the hands of the assignee, and of those who may subsequently in succession acquire right to it. We have ascertained how it may be extinguished by the voluntary performance of the debtor, and discharge of the creditor; and, lastly, where implement cannot be obtained voluntarily, we have examined the steps and forms of compulsion which may be used against the person and property of the debtor, in order to enforce performance. The ground which we have traversed may sometimes have appeared dreary and uninviting, but the time has not been misspent if we have thus obtained an acquaintance with the principles which regulate the constitution and use of written personal obligations.

We shall now proceed to trace through the same successive stages the peculiar forms of conveyancing, which are practised in the use of bills and promissory notes.

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COMPETITION OF
ARRESTMENT
WITH ASSIGNA-
TION.PREFERENCES,
HOW PRE-
VENTED.

M. voce, "Fo-
rum Compe-
tens," Appx.
No. 4.
M. voce, "Bank-
rupt," Appx.
No. 26.

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CHAPTER V.

BILLS AND PROMISSORY NOTES.

GENERAL NATURE AND HISTORY OF BILLS AND PROMISSORY NOTES.

WE are now to direct our attention to a kind of writings, which in their form and mode of use are altogether peculiar, and exempted in many important respects from the regulations applied to deeds. Bills and promissory notes have special characteristics and privileges, corresponding to their proper purpose and use. The bill of exchange was originally designed as a medium for the payment of debts, owing by the subjects of one state to those of another. This object it accomplished in a manner the most simple and effectual. A bill may be described as an open letter, in which the writer requests the person to whom it is addressed to pay a specified sum of money to a third person, who is named. The advantages to all concerned of such an expedient for settling the mutual claims of persons residing in different countries or at a distance from each other, are obvious. Suppose the sum of £1000 to be owing by a merchant in Leghorn to another in London, and that the third party is one going from London to Leghorn, and having occasion, in the latter city, for a sum of £1000. Instead of carrying the coin with him, at much trouble and great risk, he pays his £1000 to the London merchant, and gets for it a bill, or draft upon the debtor in Leghorn, by means of which the money will be at his command upon his arrival. The creditor in London receives what is due to him, with the same facility as if it were owing by a fellow-citizen, and the foreign debtor is enabled to pay his debt, and is, at the same time, as effectually discharged, as if the hazard and expense had been incurred of sending a messenger with bags of money from Leghorn to London to pay the amount and take the creditor's receipt. Being thus intended by their primary purpose to adjust the mutual claims of parties subject to different governments, bills of exchange are in a large measure subject to rules of a wider application than are found in the Municipal Laws of any one country. In so far as is necessary for the ready and secure negotiation of mercantile transactions between the subjects of different states, the Municipal Law wisely defers to certain general prin-

ciples, which, owing their origin to a common perception of their justice and equity and convenience, have been established by general consent and long usage, and, although not embodied in any substantive form, are known by the collective name of the Law Merchant. Bills of exchange were thus originally a system of conveyancing adapted to the whole human family without national distinction, and it was an inherent necessity of such a system, that its forms should be simple and easily understood and practised, and that such credence and facilities of execution should be extended to its documents as would give to all parties the same confidence in transacting with the subjects of a foreign state, which in other matters they feel under the protection of their own laws. The success with which this object was achieved by the common sense of men directed to a point of common interest, and the conveniences observed to result from the system, led, no doubt, to the introduction of a similar system among the subjects of this kingdom, the documents employed in which are called inland bills in contradistinction to foreign bills, which are named bills of exchange; and although, inland bills were at first confined to matters properly mercantile, they have gradually been extended in their application, so as to embrace transactions not connected with commerce; and thus, from a system founded upon the confidence reposed in each other by those who are subjects of different states, we have derived, and have settled by statute upon the principles applied to foreign bills by the custom of merchants, a method of internal conveyancing, widely developed, and affecting property of vast amount, of which the writings are of the simplest character, authentic without solemnity, and having their performance secured by stringent rules and summary execution.

It is remarkable that there is no evidence of the use of bills of exchange among the Romans, the more so as, in a passage referred to by Pothier, we find Cicero, in the 24th Epistle of the 12th Book of his letters to Atticus, inquiring, in the view of his son going to Athens, "*quod illi opus erit Athenis, permutari ne possit, an ipsi ferendum sit*"—that is, whether he will be able to procure what he requires in Athens by exchange, or whether he must carry it with him. This, however, as Pothier shews, is evidence merely, that the want of a system of exchange was felt, for that none such existed is proved by the practice of money-lenders to send along with the trader on his voyage a slave to receive the amount of their loan upon his arrival at the port where his merchandise was converted into money—a practice which could not have existed had the method of remittance by bill of exchange been known. The general disregard or contempt for commercial pursuits among the Romans lends a general confirmation to this proof of their ignorance of the method and practice of exchange of money, and it affords a striking view of the entire change

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GENERAL NATURE AND HISTORY OF BILLS AND NOTES,
cont^d.

of sentiment as well as of habit, in modern times, when we consider how intimately that practice is now connected with the affairs of nations and individuals, and how indispensable it is to the wellbeing and the very existence of commercial relations. It is calculated upon a probable estimate, founded on the number of stamps sold, that the value of bills and notes used in Great Britain alone, exceeds in one year the sum of three hundred millions of pounds sterling.

We read that paper money was used in the Mogul empire in China at the beginning of the thirteenth century. In Europe, bills of exchange are said to have owed their origin to necessity, the frequent mother of invention, having been devised by the Jews upon their banishment from Guienne in 1287 and from England in 1290 as an expedient for withdrawing their property out of the countries from which they had been expelled into those where they had chosen to reside. The origin of bills has also been ascribed to the Florentines, expatriated after the struggle between the Guelph and Ghibelline factions, as a means of removing their effects from Florence to Lyons and other places where they had taken refuge. These conjectures have a chronological agreement with the fact ascertained by a Venetian law, that bills of exchange were in use in the fourteenth century; nor do they want a foundation of probability in the nature and form of the bill of exchange itself. In England, so early as the year 1255, we find a remarkable instance of the use of bills of exchange. Henry III. having contracted a large debt to the Pope in an attempt to make his son King of Sicily, the sovereign pontiff was importunate for payment, in order to rid himself of the Italian merchants who had made the advance. At the suggestion of the Bishop of Hereford, these merchants drew bills upon all the rich bishops, abbots, and priors in England, which these dignitaries were compelled to accept and pay under threats of excommunication—a result of financial rather than of moral benefit flowing from the then existing diplomatic relations with Rome.

Before proceeding to examine in detail bills and notes, it will be useful to advert for a moment to the general nature and form of the foreign bill, or bill of exchange, the inland bill, and the promissory note.

NATURE AND FORM OF THE FOREIGN BILL.

The foreign bill was introduced, as we have seen, for the purpose of transmitting money from one country to another, or, as Mr. Erskine expresses it, to make payment in distant places easy and safe. It was called a bill of exchange, because the price of it depended upon the exchange of money—that is, the difference in the value of money, where it was drawn and purchased, as compared with its value in the place drawn upon, and where it was payable. In its form, this document is simply an order or request by a party in one country, who is called the drawer, requesting the person to whom it

is addressed in another country, and who is called the drawee, to pay, at or within a time specified, a certain sum of money to a third party, who is called the payee, or to any person whom the payee may authorize. In order to obviate the risks connected with distant transmission by land or sea, foreign bills are commonly drawn in sets—that is, the bill is written in three parts or copies, each of which is numbered, and the order to pay in each copy is made conditional upon the other two being unpaid. The following is an example of the form of a foreign bill, drawn by a merchant in Canada upon his correspondents in England :—

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CHAPTER V.
NATURE AND
FORM OF
FOREIGN BILL,
contd.

£1000 St^r.

Montreal, 1st June 1847.

Ninety days after sight of this my first of exchange, (second and third of the same tenor and date not paid,) pay to A. B., or to his order, One thousand pounds sterling value received from him in goods.

(Address.)

(Signature.)

The parties to a foreign bill being of different kingdoms, the rights and questions arising from that document are regulated, as we have seen, by the principles of mercantile law, and the municipal law is applied only where it interferes by positive statute, as is done in Scotland with regard to prescription and execution.

The inland bill sprang, as we have seen, from the conveniences observed to attend upon the bill of exchange, and it was found to be peculiarly well adapted for the settlement of the price of goods or of other debts of a mercantile, and eventually of any other, description, which were not immediately payable.* From the legal character which the bill obtained, the creditor in debts of the kind referred to, by obtaining his debtor's bill, was placed in the same advantageous position as if he had by anticipation obtained a judicial decree for the amount. Through the medium of the capitalist or banker also, he could convert the future claim into immediate cash, diminished only by the interest discounted. Thus the purchaser got his credit, the seller his ready money, and the man of capital an investment for his unemployed funds. It cannot be wondered at, that a system so advantageous to all should have been eagerly embraced by those engaged in trade, and that, so soon as the jealousy of the law was removed, (for it was long before the inland bill came to be viewed with the

NATURE AND
FORM OF THE
INLAND BILL.

* An inland bill is defined by 19 & 20 Vict. cap. 60, § 12 :—" Every bill of exchange drawn in any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of Her Majesty ; and made payable in or drawn upon any person resident in any part of the said United Kingdom or islands, shall be deemed to be an inland bill ; but nothing herein contained shall alter or affect the stamp duty, if any, which but for this enactment would be payable in respect of any such bill."

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favour it now receives,) and so soon as legal countenance and facilities were extended to the practice, it should have been widely adopted. There may be three parties to the inland bill, as there are to the bill of exchange; but, in Scotland, there are more generally two, viz., the drawer and the drawee, the amount being made payable directly to the drawer himself. The inland bill then may be in these terms:—

£100 *Stg.*

Edinburgh, 1st Novr. 1847.

Three months after date, pay to me or my order, the sum of One hundred pounds sterling, value received.

(Address.)

(Signature.)

NATURE AND
FORM OF THE
PROMISSORY
NOTE.

The promissory note is nearly allied to the inland bill in its purpose and use, being chiefly adapted, and for the most part probably employed, for the acknowledgment and constitution of existing debts. In form it is simpler than either the bill of exchange or inland bill, and it admits of only two parties, one *the maker*, who promises at a certain date, or within a certain time, to pay a sum specified to the other, who is named the payee. Instead of an order or request, therefore, as in the bill, the promissory note contains a promise to pay; and, as the bill, when its order is accepted by the drawee, becomes an obligation upon him, so the promissory note is equivalent to a bill drawn by the maker upon himself in favour of his creditor, and accepted at the time of drawing. The terms, then, of a promissory note are to this effect:—

£100 *Stg.*

Edinburgh, 1st Novr. 1847.

On demand, I promise to pay to A. B., or his order, the sum of One hundred pounds sterling, for value received.

(Signature.)

The forms now exhibited sufficiently shew—what will be amply confirmed in the sequel, when we come to treat of the acceptance and transmission of bills and notes—viz., that these documents are exempted from technical formality, as well as from the solemnities of authentication; and, as the law has in these respects, as well as with regard to the mode of execution, conferred great privileges, so it is very stringent and exact in requiring a precise compliance with the rules which it has prescribed with regard to their substance and negotiation.

In order that our examination of the various parts and privileges of bills and notes may be the more intelligible, there being a mutual relation and dependence in all the particulars, so that each of them requires, for the thorough understanding of it, some knowledge of the rest, it is desirable to point out briefly here the general mode of using these instruments, and giving them effect.

When a bill, then, is written and subscribed by the drawer, the next step is, that it be accepted by the drawee. This is not indispensable for all purposes of negotiation, but it is necessary in order to create an obligation upon the drawee, who is then called the acceptor, and the bill, in business language, is thenceforth called his acceptance. The effect of acceptance is to complete the assignment of the drawer's funds in the hands of the drawee to the amount of the bill in favour of the payee. An accepted bill is the same as a promissory note with respect to the obligation upon the debtor. The next point is the power of transferring a bill or note. This makes it a fund of credit; the payee, being able to assign his future claim, is enabled to obtain its present value. The facility of transmission is one of the chief characteristics and great privileges of the bill or note. If it is payable to the bearer, it can be transferred by mere delivery. If it is payable to a payee specified, or to his order, it is transferable by indorsation, *i. e.*, by his subscription upon the back of the instrument; and it may be transferred indefinitely by successive indorsations. Every one who thus transfers a bill or note is called an indorser, and he who acquires right to it by indorsement is called an indorsee. The person in whose legal possession it is for the time, is called the holder. As, after acceptance, the drawer remains liable to the payee for the contents of the bill or note, should the acceptor fail to make payment, so the payee remains liable to his indorsee, and each indorser in succession remains liable to the person to whom he has indorsed the instrument, and all of them are directly liable to the holder, who can thus, if the acceptor fails to pay, have recourse against every one whose name appears on the bill or note either as drawer or indorser. When the bill or note arrives at maturity—that is, at the term of payment, if the acceptor fails to make payment, the holder takes a protest,* and gives notice to the drawer and indorsers, that the bill or note is dishonoured. His recourse is thus preserved against all concerned; and then comes the last distinguishing feature and peculiar privilege of bills and notes, *viz.*, execution by summary diligence. The protest is recorded along with a copy of the bill or note, and an extract is obtained containing a warrant, upon which execution may proceed immediately against the whole parties upon a charge of six days.

We have stated the course of procedure in its simplest form, and only with a view to general perspicuity. Acceptance is not necessarily antecedent either to negotiation or to payment. But, where acceptance is requisite and is refused, there must be a protest for non-acceptance,† and notice to all concerned, in order to preserve recourse for relief of such value as may have passed upon the bill or note in its unaccepted form.

* See note, p. 353.

† Ibid.

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MODE OF USING,
AND EFFECT OF,
BILLS.
1. ACCEPTANCE.

2. TRANSFER-
ENCE.

3. DISHONOUR.

4. EXECUTION
BY SUMMARY
DILIGENCE.

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CAPACITY OF
PARTIES TO
BILLS AND
NOTES.

We shall now proceed to examine in detail the parts of a bill or note, and the rules for its negotiation and enforcement.

And, in the first place, as regards the capacity of parties to a bill or note, reference must be made to what has already been stated when we examined the capacity of persons to execute deeds, and their incapacity by reason of various grounds of disability. The principles then ascertained determine the capacity or incapacity of parties to bills or notes, as well as to solemn deeds, and it is, therefore, unnecessary to resume that part of the subject.

STAMPING OF
BILLS, &c.

See *supra*, pp.
85, 90.

11 S. 397.

7 Wil. & Sh.
App. 176.

Reference must also be made to what was stated in treating of the laws relating to stamp-duties, for information regarding the stamping of bills of exchange, inland bills, and promissory notes. It will be remembered that such bills and notes as are not written upon stamped paper are absolutely and incurably void. When a stamp of higher value than is required is used, the bill is good, if the stamp be of the proper denomination. Where a stamp of a wrong denomination has been used, it may, provided the duty paid be not less than is required by law, be rectified upon payment of a penalty. The serious consequences of non-compliance with the statutes in this particular, are well illustrated by the case of *Ettles v. Robertson*, 15th February 1833, where an action was founded on a debt constituted by bill, and also upon a trust deed and other documents acknowledging the debt. At a late stage of the litigation, it was objected that the bill was written upon a stamp bearing 4s. 6d. of duty, whereas it ought to have been 5s. The Court of Session disregarded the objection, holding, according to the Lord Ordinary's interlocutor, that it was excluded by delay and personal exception. The decision was reversed, on the ground of the Stamp Act alone; 5th April 1854. By 17 & 18 Vict. cap. 83, § 5, foreign bills are now subject to stamp-duty, which the holder must pay by affixing adhesive stamps, a penalty of £50 being incurred by any party who shall present, pay, or negotiate a foreign bill not so stamped. When a bill purports to be one of a set, the whole set must be drawn and stamped under a penalty of £100; and, if one of a set be taken in payment or security without getting delivery of the whole duly stamped, the amount, by § 6, is not recoverable. Other points requiring attention in connection with the stamp laws will be more appropriately noticed, when we come to treat of alterations and vitiations of bills.

GENERAL FORM
OF BILLS AND
NOTES.

Bills and notes may be written in any language, and there is no form of words indispensable to their validity. All that is necessary is, that there be an absolute order or promise by one party to another to pay a sum of money. In England, expressions importing such an order or promise, though not conveying it in the ordinary phraseology, have been sustained, as where the order was "to *deliver money*," and the promise, not "to *pay*," but "to *be accountable*," or that "the *pro-*

"*misee should receive*" a certain sum. In France, the common language of a bill is, "*il vous plaira payer.*" But it appears not to be quite safe to employ the language of courtesy in England; for, although in one case Lord KENYON held a document to be a bill, which was thus expressed, "Mr. Nelson will much oblige Mr. Webb by paying to J. Ruff, or order, twenty guineas on his account," Lord TENTERDEN held the following not to be a bill:—"Mr. Little, please to let the bearer have seven pounds, and place it to my account, and you will oblige your humble servant, R. SLACK-FORD." The *ratio* of the latter judgment was, that the paper was not a demand by a party having a right to call on the other to pay. The fair meaning was, "you will oblige me by doing it." But this is just the language which Lord KENYON sustained. In Scotland, however, there is a reason for studying explicitness in the language of bills and notes, which does not exist in England. In the latter country, the remedy in the event of failure in payment is by an action in the Courts. But in Scotland, as we have seen, the creditor has by statute summary execution against his debtor's person and property; and it is clear that a man's liberty and estate cannot be rendered insecure by a document, of which the terms are ambiguous or doubtful. On this account, therefore, and in order to keep fully available the legal remedies in case of non-payment, it is advisable, though it be not imperative, to adhere to the words sanctioned by usage, of which examples have been given.

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CHAPTER V.
GENERAL FORM
OF BILLS AND
NOTES, *contd.*
Byles, p. 59.

Let us now proceed to examine in detail the parts of a bill according to the form ordinarily used.

1. *The sum superscribed.*—It is usual to write the sum drawn for at the top upon the left side. This is not essential, and the omission of it would form no objection to the bill or note. It is the sum written in the body of the bill that determines its amount, and that sum will be the rule in the event of a discrepancy between it and the amount superscribed. But the superscribed sum may be referred to for explanation; *Gordon and Garrow v. Sloss*, 3d June 1848. Here a bill was drawn for "twenty-two six shillings and eightpence," but bore "£22" in figures on the margin. It was sustained as a good bill even to warrant summary execution. 10 D. 1129.

2. *Place and Date.*—(1.) It is usual and proper to superscribe the name of the place, where a bill or note is made, but this is not absolutely requisite, unless it may be where the place is essentially necessary by the terms of the bill—for instance, where it bears, "*Pay to me here,*" in which case the place of payment cannot be ascertained. The place also seems to be essential in a foreign bill drawn payable at usance, (which means the ordinary period of exchange between the places,) for, in this case, the date of payment cannot be ascertained without knowing the place drawn from. We *Supra*, p. 86.

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DATE OF BILLS
AND NOTES,
contd.
M. 1429.

have seen that bank drafts, in order to be exempt from stamp-duty, must bear the place where they are written, and that such place must be within fifteen miles of the bank.

(2.) Mr. Erskine says, that "our usage rejects bills which have no date." The case cited in support of this *dictum*, *Douglas and Lindsay v. Brown*, 15th November 1757, has evidently been referred to under a misapprehension, as it relates not to the necessity of a date, but to the validity of a bill stipulating interest from its date—a point which will claim our attention afterwards. It will be seen, however, from the context of the passage we have quoted, that what Mr. Erskine means is such a date as is requisite to determine the day when the bill will be payable, for he speaks of bills without a date being "designed by the parties as lasting securities for sums of money." But it is evident, that, when a bill specifies in its body the term of payment by year and month, and day, or when it demands payment within a certain number of months or days after sight, the design of the instrument to produce a settlement of the sum it contains at the term prescribed is clear, whether a date be superscribed or not. The rule, therefore, may be stated thus, viz., that it is not indispensable that the date of drawing or making a bill or note be superscribed, unless such date be requisite, in order to determine the day of payment.* It is very necessary, in relation to the date of bills and notes, to keep in view the 12th section of the Act 55 Geo. III. cap. 184, which imposes a penalty of £100 for making and issuing a bill or note post-dated so as to bring its apparent date within two months of the day of payment, although the date of making it was beyond that time. Although the date of making a bill or note is not always indispensable, its insertion is advisable, and ought to be the rule. A bill or note bearing the date of making it is more highly privileged than a holograph deed, in this respect that it proves its own date. This is now established by decisions, to which we shall presently refer, and which have invested the bill and promissory note with the character of complete legal documents *in suo genere*, bearing the same faith in the absence of challenge as a formal deed executed with all the legal solemnities. From the doctrine that a bill proves its own date results this important consequence, that it is not liable to challenge on the head of death-bed, as holograph writs are. It will be remembered, that a holograph writ is not admitted as evidence of its own date, and that in cases of death-bed, and in other cases, it is always presumed (without regard to the date it bears) to be of the date least favourable to the

* The recent statute, 19 & 20 Vic. c. 60, § 10, enacts, that, where "any bill of exchange or promissory note shall be issued without date, it shall be competent to prove by parole evidence the true date at which such bill or note was issued: Provided always, that summary diligence shall not be competent on any bill or note issued without a date."

party founding upon it. But it is not so with bills and notes, which are admitted to prove their own dates, as well as authenticated deeds. This was settled in the case of *Kennedy v. Arbuthnot*, 8th July 1725, where a party, being sued for payment of bills accepted by his ancestor, pleaded that, as he was an heir, the bills did not prove their dates against him, but were presumed to have been granted on death-bed, in the same manner as holograph writs. But the Lords found, that accepted bills prove their dates against the acceptor's heirs. Another consequence, which follows from the doctrine that a bill proves its own date, is, that the holder of it is entitled in competition with diligence to be ranked as a creditor whose right is of the date of the bill. We have seen that bills and notes are transferable by indorsation. It is not usual to date the indorsation, and it is ruled, that the indorsation is to be held as of the same date with the bill. Now the effect of this legal presumption is important, inasmuch as it protects the *bona fide* indorsee, who has paid value for the bill, against diligence used to attach the fund in the acceptor's hands, subsequently to the date of the acceptance, although it may have been antecedent to the actual date of the indorsation. This was decided in the case of *Smith v. Home*, 5th December 1712. Here a creditor of the payee arrested in the acceptor's hands, after the date of the bill, but, as was alleged, previous to the indorsement; and the Lords preferred the indorsee or possessor of the bill, in respect it was not alleged, that the indorsation was without an onerous cause, or that the indorsee knew of the arrestment when the bill was indorsed to him. The same principle was strongly confirmed by the Court in the case of *Graham v. Leny*, 15th May 1794, where the Court gave to an indorsation, bearing a date four years subsequent to the date of the bill, the benefit of the legal presumption that it was of the same date as the bill. We have already seen, that, in the case of *Elliot and Son v. Faulke*, 20th January 1844, it was held not to be an objection to a bill that it was drawn upon a Sunday. In that case, a distinction was made in the Judges' opinions between the acts of drawing and accepting, in such terms as to prevent its being held as conclusively determined that an acceptance dated on Sunday would be valid. In a recent work, Broom's Selection of Legal Maxims, it is stated, that

"in an action by the indorsee against the acceptor of a bill of exchange which was drawn on a Sunday, it was held that the plaintiff might recover, there being no evidence that it had been accepted on that day; but the Court said that, if it had been accepted on a Sunday, and such acceptance had been made in the ordinary calling of the defendant, and if the plaintiff was acquainted with this circumstance when he took the bill, he would be precluded from recovering on it, though the defendant would not be permitted to set up his own illegal act as a defence to an

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M. 1477.

DATE OF BILLS
AND NOTES,
contd.

M. 1502.

Bell's Fol.
Cases, 5.

6 D. 411.

p. 21.

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“action at the suit of an innocent holder.” The statute by which Sunday trading is prohibited in England is 29 Charles II. cap. 7, and the only material difference between its terms and those of the Scottish Act 1579, cap. 70, appears to be the use in the English enactment of the words, “of their ordinary callings,” which do not occur in our statute, the prohibition in it being general of “all “handy labouring or work to be used on the Sabbath.” The question being open, therefore, of the legality of acceptance to a bill upon Sunday, it will be for the consideration of the Court, when the point shall arise, whether the same effect is to be given to the Scotch statute as to the English one. In the meantime, the matter is so doubtful, that a prudent agent upon legal grounds merely, (apart from reasons of a different and higher kind,) will esteem it his duty, so far as his advice may prevail, to prevent its occurrence.

TERM OF PAY-
MENT OF BILLS
AND NOTES.

3. *Term of Payment.*—The first thing inserted in the body of a bill or promissory note in ordinary practice is the time of payment. It is not, however, an indispensable requisite that a term of payment be specified, and it is settled in England, that a bill or note on which no time of payment is specified, is payable on demand. The same would in all probability be held in Scotland. There are different modes in practice of expressing the time of payment. It may be a future date precisely fixed by naming the day, month, and year—or it may be on demand, or a specified number of days, or weeks, or months after the date of the bill or note, or it may be at sight, *i.e.*, whenever it is presented to the drawee, or a specified number of days, weeks, or months after sight. In foreign bills, the time of payment may be determined in any of these ways, or it may be at usance—that is, the ordinary period, according to the custom of merchants, at which bills are drawn in the country where the drawer resides upon the country of the drawee, or at two or more usances, or, as it may be expressed, at double, treble, or half usance. Although the entire omission of a time of payment will not nullify a bill, yet, when a time is inserted, it must be clear and definite, so that the bill or note will certainly become due at a date capable of being distinctly ascertained. According to our early practice, bills drawn at very distant dates were disallowed. In England, however, it has been said :—“If a bill of exchange be made payable at never so distant a day, if it be a day that “must come, it is no objection to the bill ;” and Lord IVORY, in his notes to Erskine, quotes that *dictum* as containing what would now without doubt be held the true principle. So lately as in the year 1796, it was seriously doubted upon the Bench, whether a promissory note, payable by instalments at successive dates, was entitled to the statutory privileges, and the Court avoided a decision of the question by turning the decree of registration into a libel, and issuing a decree for the debt ; *Carron Co. v. Muirhead*, 25th February 1796. This

Byles, p. 58.

Byles, p. 59.

Inst. iii. 2, 38.

M. 1457.

course was taken, however, only in deference to the doubts of one or two Judges, the Court in general being of opinion that the note lay under no legal objection. Bills and notes payable by instalments at successive dates are, accordingly, of frequent occurrence; and in the Style Book there will be found the form of a promissory note for a sum payable "*by equal instalments at three, six, and nine months.*" Such instruments are well adapted, and are consequently in familiar use, for the payment of compositions to creditors.

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Vol. ii. p. 6.

4. *The order or promise to pay.*—The next part is the order or promise to pay, regarding which any remarks necessary to be made have already been stated in commenting upon the form of the bill or note generally, and these need not now be repeated.

5. *Name of payee.*—The name of the payee (which must, of course, be rigidly accurate) is sufficient, although there be no description or designation of him inserted, his designation being held to be supplied by his possession of the bill. It is indispensable, however, that there be a payee either named or indicated, and it is sufficient, if the bill or note be made payable to the bearer, in which case it is transferable by delivery. This is contrary to the decision in the case of *Walkingshaw's Executors v. Campbell*, 8th January 1730, where a bill payable to the bearer was, after great difficulty and alternation of opinion, (there being seven conflicting judgments,) found not obligatory, as a writ blank in the creditor's name, and so falling under the Act 1696, cap. 25. But the sufficiency of such notes is now established by long and universal practice. The payee may be pointed out, and generally is so in Scotch bills, by the words "*pay to me*"—that is, to the drawer. But the payee must be a person distinctly defined, and entitled to receive the contents without any contingency, and, therefore, it has been held in England, that a note payable to one person or to another cannot be sued on, since, with respect to each of them, the condition is implied that it has not been paid to the other. And, in Scotland, a bill payable to the drawer, or in the event of his decease to his son, was found null; *Inglis v. Wiseman's Representatives*, 27th July 1739. But the payee may be one person for behalf of another. In England, a promissory note "to the trustees acting under A.'s will" has been held good. But in Scotland the trustees in such a case should be named, in order that diligence at their instance may be competent. In the recent case of *Watt's Trustees v. Pinkney*, 21st December 1853, bills drawn upon three persons *nominatim* and the other trustees of A., (there being four others,) was held sufficient, coupled with evidence of the trustees being in the knowledge of the bills, to operate as an assignation of the drawer's claim on the trust funds in favour of the holder. If the payee's name be left blank, any *bonâ fide* holder—that is, any one possessing the bill by a legal title, as by purchase or otherwise—may insert his

PAYEE'S NAME.

M. 1684.

See pp. 130,
326, 328.

Thomson on
Bills, p. 79.

M. 1404.

Byles, p. 60.

16 D. 279.

Thomson, p. 80.

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own name as payee, the issuing of the bill with a blank being held to imply an authority to a *bonâ fide* holder to insert the name.

To the payee's name there are generally subjoined the words "*or order*," which mean to any other person, to whom the payee may by indorsation "*order*" the acceptor to pay. In England, the words "*or order*" are necessary to make a bill negotiable. But it is not so with us. This was long ago expressly decided in *Crichton v. Gibson*, January 1726, where it was successfully pleaded, that it is no more requisite to take a bill payable to order, than to take a bond payable to assignees. The rule thus fixed still subsists, and it is perfectly settled, that bills and notes are transferable by indorsation, though not made payable expressly to order.

A bill or note may be made payable to the payee "*or bearer*," in which case it is transferable by delivery without indorsation. Such a form invests the instrument with a dangerous facility of negotiation, and enlarges, therefore, the risks resulting from its being lost or stolen.*

PLACE OF PAYMENT.

6. *Place of payment*.—If a place of payment is inserted in the body of the bill or note, it occurs immediately after the words "*or order*" or the payee's name; but it is not necessary to specify a place of payment. Where it is done, the object of course is to secure payment at a place convenient to the creditor, and to obviate any difficulty as to the negotiation, and, if necessary, the protest of the bill, in case of any doubt as to the acceptor's residence. A place of payment is sometimes added to the acceptance, and the terms in which this is done may have important effects. To these we shall advert when treating of acceptance.

SUM IN BILLS AND NOTES.

7. *Sum drawn for*.—A bill or note can only be granted for a sum of money, such being the sole purpose contemplated by the statutes conferring their privileges, 1681, cap. 20, and 1696, cap. 36. Accordingly, in the three first cases reported in the Dictionary under the head, "*BILL OF EXCHANGE*," the Lords refused to extend the privileges to bills, granted not for money but for fungibles, viz, salt and victual. Mr. Erskine refers to the last of these cases, *Bruce v. Wark*, November 1729, as declaring that bills for fungibles have no obligatory force, as wanting the writer's name and witnesses. The decision as reported, however, is expressly to the contrary effect, the document, although denied the statutory privileges, having been sustained as a probative writ; and a reservation to the same effect was made in the earlier case of *Leslie v. Robertson*, 16th December 1713, the unfavourable judgment being pronounced without prejudice to salt-bills, meal-bills, or bills for the like fungibles, "being sustained as probative *in re mercatoriâ* without writer's name and witnesses, and the "ordinary solemnities required in other writs." The recent decision

* See note, p. 341, *in fine*.

in *Bovill (Ball's Trustee) v. Dixon*, 18th February 1854, is to the same effect. There a document in these terms :—" I will deliver 1000 tons pig iron, when required after 10th September next, to the party lodging this document with me," was held to be *in re mercatoriâ*, not struck at by 1696, cap. 25, and transferable by simple delivery, without formal assignation, or indorsation. This case has been taken to appeal.* To entitle it to the statutory privileges, however, a bill or note must be for a sum of money, and payable in money alone ; and it is said, that in England promissory notes have been found null, because made payable in Bank of England notes. The sum of money must be definite, and payable at a determinate period or periods. Bills are designed to pass from hand to hand, as bags of money, and it is clear, that they are not thus negotiable, unless the extent of the obligation which they import, as well as the period of its performance, be clearly and precisely marked upon their face. The Court, therefore, refused to sustain as a bill an order for ten shillings a-day, to be paid until the payee should be provided with a company in Her Majesty's forces ; *Viscount Garnock v. Duke of Queensberry*, February 1721. PART II.
CHAPTER V.
16 D. 619.
Thomson, p. 9.
SUM MUST BE
DEFINITE.
M. 1401.

8. *The value*.—After the sum there are generally inserted the words, "*for value received*," or "*for value*." As a bill may competently be drawn and carry all the legal effects, where there are no funds of the drawer in the drawee's hands, these words are not indispensable. Of the legal presumption which arises when they are used

* It was further held in that case, that a demand for delivery of the iron, made upon the seller by any third party holding the document, and lodging it with him, could not be validly met by any plea of retention, whether arising out of the non-payment of the price by the original purchaser, or any other transaction between the original purchaser and seller. A similar judgment was given in the case of *Dimmack, &c. v. Dixon*, 1st February 1856. 18 D. 428 ; There an iron-master sold iron, giving the purchaser a document in similar terms to that in *Bovill's* case, while the purchaser, in return, granted his bill for the price, not payable, however, till after the date of delivery. Soon afterwards the purchaser became bankrupt, and his bill was dishonoured. He had sold the document received from the iron-master, who, upon the holder presenting it, refused to deliver the iron, on the ground that the original purchaser was bankrupt, and the price had not been paid. In these circumstances a majority of the whole Court held, that the document was granted *in re mercatoriâ*, and was not struck at by 1696, cap. 25—that it was transferable without indorsation, and did not require a stamped assignation—that from its terms it imported a direct obligation in favour of the holder, and did not put him in the position of a mere assignee of the original purchaser—and that the seller who had issued such a document had no right of retention against an onerous holder on the ground of his remaining the undivested proprietor of goods, the price of which had not been paid. "VALUE RE-
CEIVED."

The judgment in *Bovill v. Dixon*, has been affirmed in the House of Lords. The appeal has not yet been reported, but the affirmance is believed to have proceeded solely on the ground, that the holder of the delivery order had presented it to the seller before the price had become payable, and, consequently, before any right of retention had arisen, and had been distinctly recognised and dealt with by the seller as coming in place of the original vendee. But it is understood that doctrines were laid down by the Lord Chancellor, in regard to the validity and privileges of the documents usually termed *iron-scrip*, which may lead to a reversal by the House of Lords of the judgment in *Dimmack, &c. v. Dixon*.

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M. 1484. we shall speak when we come to examine the effect of payment of a bill. The favour and effect given to a bill, as a negotiable instrument entirely detached from any dependence upon the transactions out of which it has arisen, are strongly exemplified in the case of *Wallaces v. Barrie*, 29th November 1703, where a bill was sustained, and enforced against the acceptor, although the specified nature of the value contained in it was admitted to be false. The general competency of a bill to constitute a debt, and operate as an effectual security, although not arising out of a mercantile transaction, is established by the judgment in *Turnbull v. Tudhope*, 18th June 1748, where the plea that the bill was not *in re mercatoriâ* was disregarded.

ADDRESS OF
BILL.

M. 1447. 9. *The address.*—The address of a bill—that is, the name of the person drawn upon, is written in some countries upon the back. By our practice, it is put below the body of the bill upon the left side. The want of an address is, no doubt, an awkward defect, but it does not annul the bill, if it is accepted, the person who accepts being presumed to be the person addressed. This was decided in *Grierson v. Earl of Sutherland*, 28th June 1727.

SIGNATURE OF
DRAWER.

Hume, p. 57. 10. *Subscription of the drawer.*—The next point is the drawer's subscription. It is not necessary that the drawer of a bill be designed in it; and, when the bill is written by himself, and his name inserted *in gremio*, that is equivalent to subscription; *M'Bean v. M'Pherson*, 22d November 1806. But we shall afterwards see that this will not warrant summary diligence.

BILL BLANK IN
CREDITOR'S
NAME.

As the drawer is, for the most part, the creditor in our inland bills, this is the proper place to consider the effect of a bill in which the creditor's name is blank. Mr. Erskine, upon the grounds of usage, and of the Act 1696, cap. 25, which annuls all writs subscribed blank in the name of the person in whose favour they are conceived, holds, that a bill drawn blank in the creditor's name is null. And, on the principles of mandate, which require the subscription of the mandant, he conceives a bill produced in judgment without the drawer's subscription to be also void. The increasing favour shewn to commerce, however, and to bills as mercantile instruments, has altered the state of the law upon this subject, and it is now settled that, although a bill wanting the signature of the drawer cannot be the ground of summary diligence, yet it is a probative writ, and may be sued upon by any one who can shew that he has a right to the debt, the Act 1696 being held to apply only to deeds requiring to be executed with statutory solemnity, and the indorsation of bills to be introduced in that Act not as an exception but as a declaratory explanation. This is conclusively settled by the decision in *Macdonald's Trustees v. Rankin*, 13th June 1817, and by the cases there cited, in all of which right of action was sustained against the acceptors of bills

See *supra*, pp.
130, 325, 326.

F. C.

not subscribed by the drawer, who was also the payee, in favour of parties shewing that they had a title to the debt. In the case of *Fair v. Cranstoun*, 11th July 1801, referred to in *Macdonald's* case, it was said upon the Bench, "that a blank acceptance found in the 'repositories of a defunct' (drawer) 'may be filled up by his representative, and diligence may proceed in his name.'" Lord IVORY, in his note to Erskine, doubts this, and recommends, in such circumstances, to proceed by action. This was the course adopted in the case of *Fair*, although the representative of the deceased inserted his own name as drawer before instituting the action. Baron HUME has reported a case, in which a bill signed by two acceptors, though only addressed to one of them, and not subscribed by any drawer, was sustained as a ground of debt against the acceptor not named in the address; *Dalrymple v. Bryson*, 13th December 1810. In further accordance with the principles which rest the efficacy of bills and notes upon the essence of the transaction, more than upon an exact arrangement of parties, it is settled that, where one gives value for an accepted bill not signed by the drawer, he may insert his own name as drawer and use summary diligence; *Disher v. Kidd*, 16th November 1810; *Smith v. Taylor*, 27th February 1824. But a bill not signed by the drawer will not warrant summary diligence, even although it be holograph, and contain the drawer's name in its body; for, although this as an obligation is equivalent to subscription, yet a proof of holograph being requisite, the writ is not *ex facie* complete; *A. v. B.*, July 1750.

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CHAPTER V.
M. 1677.

Inst. p. 624.

Hume, p. 67.

Hume, p. 64.
2 S. 755.

M. 1444.

A bill may also be drawn and indorsed by the drawer's mark; and, in an old case, a bill subscribed by a drawer's mark was sustained upon proof of the party's custom to sign by a mark; *Brown v. Johnstone*, 26th February 1662. And, although subscription by a mark was held ineffectual without subscribing witnesses in the case of *Stewart v. Russell*, 11th July 1815, that doctrine was afterwards materially modified, as we shall presently see.

SUBSCRIPTION
OF BILL BY
MARK.
M. 16802.

F. C.

See *infra*, p.
332.

We have now considered the bill, as drawn in all its parts according to its simple and ordinary form. Let us advert for a moment to the effect of any extraneous matter which may be introduced. The general rule is, that a bill or note should contain no extrinsic matter, and that it should be confined in its terms to a simple order or promise to pay a specified sum at a certain time or times. The introduction, therefore, of any words which make the payment contingent, will render the bill invalid. An order or promise subject to a contingency is inconsistent with the nature of a bill, which to be negotiable must be certain. A bill with a contingency, therefore, is null, and we have already seen such a document disallowed, where the extent of its obligation was dependent upon an individual's pre-

EXTRANEOUS
MATTER INTRO-
DUCED INTO
BILLS.

CONTINGENCY
IN TERM OF
PAYMENT.

Supra, p. 327.

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CHAPTER V.

CONTINGENCY
IN BILLS, *contd.*

ferment in the army. There is a necessary exception to the rule excluding contingent conditions in bills in the case of foreign bills drawn in sets, each one of a set being, as we have seen, subject to the contingency that the others have not been paid—and this necessarily, for, where two bills have been accepted for the same debt, and have passed into the hands of different *bonâ fide* and onerous holders, the acceptor is liable in payment of each, so that he has to pay double the amount of his debt. The law was so declared in the House of Lords in *Davidson v. Robertson*, 4th July 1815. But, although expressions which render the payment uncertain or contingent are inadmissible, that rule does not necessarily exclude all matter from the bill excepting what is indispensable; and there is no objection to the introduction of statements and explanations, as, for example, the nature of the value for which the draft is made, or a narrative of the origin of the debt. But such additions must be merely narrative or explanatory, and they must not qualify or affect the clear order or promise to pay, or the certainty of the sum, or of the date of payment. In the case of *M'Dowal v. Duke of Douglas*, June 1731, a bill was challenged as specifying a future and contingent fund, out of which the amount was to be paid. The fund never arose, but, the date of payment being fixed, the failure of the fund was disregarded, the expression in the bill being held a direction merely, and not a condition.

STIPULATION
OF INTEREST
IN BILLS.

Stipulations of interest are sometimes inserted in bills and notes, and upon this point the state of the law, as regulated by the decisions, exhibits great diversity at different periods. By the Act 1681, cap. 20, the sums contained in all bills of exchange, “bear annual-
“rent, in case of not acceptance, from the date thereof, and, in case
“of acceptance and not payment, from the day of their falling due,
“ay and while the payment thereof.” This rule was extended by 1696, cap. 36, to inland bills, and, by subsequent Acts of the British Parliament, to promissory notes. From the date of these acts, therefore, it was always competent to insert interest from the date of payment. But a stipulation for interest from the date of the bill, after being sustained in some early cases, was formerly held to infer a nullity. In the case, however, of *Sword v. Blair*, 23d June 1790, the opposite view was taken, and a bill bearing interest from its date sustained. In a note to the report of this case it is stated, that the ground of this judgment was the practice of merchants, to which the preceding decisions had been opposed.

See M. 1427,
1429.

M. 1433.

STIPULATION
OF A PENALTY
IN BILL.

M. 1432.

The exclusion of extrinsic stipulations was formerly so strict, that the insertion of a penalty was held to vitiate a bill; but it was decided otherwise in *Maclauchlan v. Maclauchlan*, 2d January 1760. And the insertion of a penalty would probably not now be regarded as objectionable.

Acceptance.—After a bill is drawn, and subscribed by the drawer, it is necessary, in order that it may operate as a complete assignment of the drawer's funds in the drawee's hands, that it be accepted by the drawee. It has always been the law of Scotland, that a bill can be effectually accepted only in writing and upon the bill, and such is now the law in England also by the Act 1 and 2 Geo. IV. cap. 78, which enacts, that "no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or, if there be more than one part of such bill, on one of the parts." This statute applies to Scotland, and it refers only to inland bills; but a written acceptance is required also upon foreign bills in Scotland, with a view to the remedy of summary diligence.* Acceptance is effectually made by the signature of the drawee upon the bill, and it may or may not have the word "accepted" prefixed to it. If he writes the words "seen" or "presented" before his subscription, that also will be a good acceptance; but a bill is good against the acceptor whose name appears upon any part of it, and the subscription of the drawee below the drawer or across the face of the bill, is the ordinary mode of acceptance. It is unnecessary that the acceptor be designed either in the address or in the acceptance; and, if the acceptance be reconcilable with the terms of the address, the drawer cannot successfully object, that the negotiation has not been with the party intended to be drawn upon. Thus, a bill, addressed to *Messrs J. and D. M'Arthur*, being accepted by *John M'Arthur and Dugald M'Arthur*, the drawer's plea, that it should have been accepted by the firm, was not sustained; *Johnston v. Cliftonhill Coal Company*, 24th November 1852. Where a party cannot write, his acceptance may be adhibited to a bill notarially, provided the notarial subscription be attested by subscribing witnesses. In *Fyfe v. Bean*, 23d June 1762, a bill was found null, which had been signed by a notary for the acceptor without witnesses; and the same was found, where the subscription was by two notaries but with no witnesses; *Buchanan v. Duncan*, 27th June 1765. But, in *Dinwoodie v. Johnston*, 28th June 1737, a bill subscribed by one notary before two witnesses subscribing and fully designed was held to be validly accepted. Subscription by notaries being equivalent to the complete signature of the party, a bill so accepted will be a ground for summary diligence. A bill is binding when accepted by the acceptor's initials, but either such subscription must be acknowledged by the party, as in *Shepherd v. Innes*, 19th

* The recent Mercantile Law Amendment Act, 19 & 20 Vic. c. 60, § 6, has enacted, that "no acceptance of any bill of exchange, whether inland or foreign, made after the 31st day of December 1856, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him."

PART II. November 1760, or the subscription must be supported by evidence ;
 CHAPTER V. *Thomson v. Shiel*, July 1729. And where such proof cannot be
 M. 16,810. adduced, and the subscription is not acknowledged, signature by
 ACCEPTANCE OF initial is not sufficient either to accept or to indorse a bill or note ;
 BILLS, cont^d. *M'Ilwraith v. M'Micken*, 23d June 1785. It is also a feature of the
 M. 16,820. great favour extended to bills, that they can be accepted by the
 See *supra*, p. party's mark—a mode of subscription not at all admissible in deeds ;
 329. *Cockburn v. Gibson*, 8th December 1815. But subscription by a mark
 F. C. must also be supported by evidence. In the case of *Stewart v. Bur-*
 F. C. *rell*, 11th July 1815, already referred to, it was stated from the
 Bench, that there must appear on the face of the instrument suffi-
 F. C. cient legal evidence that it was signed before witnesses. But this
 view was materially modified in the subsequent case of *Kennedy v.*
Watson, 25th May 1816, where it was held, that the validity of
 acceptance by a mark depends upon circumstances, there being no
 general rule as to what is sufficient evidence in such a case. Lord
 GLENLEE's opinion should be carefully noted, as containing a correct
 statement of the law on this point ; and, although there was in this
 case the specialty, that the sum in the bill was less than £100
 Scots, and not, therefore, subject to the rules affecting deeds of
 importance, yet the principles stated by Lord GLENLEE are generally
 10 S. 510. applicable ; and they were, accordingly, acted upon in *Craigie v.*
Scobie, 23d March 1832, where the signature of a promissory note for
 £50 by a mark was held sufficiently proved by facts and circum-
 stances, although not attested by subscribing witnesses. But as, in
 subscription by mark and by initials, the reality of the signature
 depends upon evidence not appearing on the face of the instrument,
 bills and notes so executed afford no warrant for summary diligence.
 This will be found established in the cases of *Cockburn* and of *Kennedy*,
supra.

The signature of a company subjects personally every individual
 partner.* See the opinion of the Court in the case of *Thomson v.*
 F. C. *Liddell and Co.*, 2d July 1812. Acceptance by an agent is compe-
 tent, and the authority of the agent will be sufficiently proved by
 evidence of written or verbal instructions, or by conduct inferring
 that he had authority. It has been doubted, whether acceptance by
 an agent be a proper ground for summary diligence against the
 principal party, but such execution was sustained in *Turnbull v.*
 1 S. 353.

18 D. (House
 of Lords) 49.

* In the *Blair Iron Company v. Alison*, 13th August 1855, it was held, affirming the judgment of the Court of Session, that a promissory note, signed by one of the partners of a trading company with the descriptive name of the firm, and with his own, is binding on his co-partners. The Lord Chancellor stated, that there was nothing in the objection to the note that it was signed with the descriptive name of "The Blair Iron Company," and with the name of "Alexander Alison," instead of "The Blair Iron Company *per* Alexander Alison;" and that any form of signature, whereby it was indicated that the note was granted by Alison as the acting partner of the firm, was sufficient to bind the Company.

M'Kie, 26th February 1822. In order, however, effectually to subject the principal parties, the signature of an agent must be expressly as agent or procurator for his principal; and, if he signs merely his individual name, the principal will not be liable. This was decided by the House of Lords in a case where bills were drawn in the individual name of a party who had authority to draw as agent or procurator for another. This agent and the acceptor having both become bankrupt, the holder had recourse against the principal, who was found liable by the Court of Session; *Telfer v. James, Wood, and James*, 5th February 1822. But the decision was reversed on appeal, 26th May 1824. In reading this case it is necessary to keep in view, that the question as viewed by the House of Lords, was, whether the bills were *per se* evidence of the debt, the other evidence of the debt being deemed insufficient. An acceptance by a factor in his individual name, though expressing to be for value given to his constituent named, imports a personal obligation by the factor; *Chiene v. Western Bank of Scotland*, 20th July 1848, a case in which the opinions of the whole Court were taken. When a promissory note is granted expressly in favour of one as agent for another, the agent is creditor in the bill to the effect of transmitting it by indorsation, and of proving the debt under the sequestration Statute; *Wixon and Deans v. Nicoll and Company*, 22d June 1849. In accordance with the self-instructing character of a bill, a party who subscribes his individual name will not be heard afterwards to plead in bar of diligence, that his acceptance was in any other than his individual capacity—for instance, as a trustee; *Clark v. Bank of Scotland*, 22d February 1823; nor will it avail him to allege, that the bill was granted to accommodate a friend, and without any value to himself. His signature infers the same liability to an onerous indorsee, as if he had received value; *Dirom v. Bond*, 7th June 1827; *Allan v. Galli*, 5th June 1829. Where a bill is accepted by one as cautioner along with another, the effect of the word “*cautioner*” is only to settle the question of relief between him and the other party liable; and his obligation to the creditor is the same as if he had signed without qualification; *Sharp v. Harvey*, 24th June 1808; *Macdougall v. Foyer*, 13th February 1810. And, when two or more parties accept a bill “*conjunctly*,” they have not the benefit of a divided liability, but are liable each for the whole, as if they had accepted “*conjunctly and severally*,” *M'Kellar v. Campbell*, 7th June 1811.

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CHAPTER V.
ACCEPTANCE OF
BILLS, *contd.*

1 S. 290.

2 Sh. App. 219.

10 D. 1523.

11 D. 1188.

2 Sh. 239.

5 S. 773.

7 S. 706.

M. “Bill of
Exchange,”
App. No. 22.
F. C.

F. C.

When the date of payment appears from the terms in which the bill is drawn, as when the day of payment is named, or is a specified number of days or months after date, then it is unnecessary to affix a date to the acceptance. But, when the term of payment is to be measured from the date of presentment—as when it is a specified

DATE OF AC-
CEPTANCE.

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16 S. 406.

number of days or months after sight—then it is obviously necessary to mark the date of acceptance. When the acceptance of a bill drawn payable at sight is not dated, the bill is held to be payable as at the date of drawing it; *Moffat v. Marshall*, 31st January 1838; and see the authorities referred to in the note to Lord JEFFREY's interlocutor. If the acceptor desire for his own convenience to pay the bill, when due, at a particular place, he may specify such place in his acceptance, and the effect of this will appear when we come to treat of negotiation.

BLANK ACCEPTANCES.

p. 624.

It is not necessary to the validity of an acceptance, that it be posterior to the writing of the bill; and if one subscribe a blank bill-stamp, and deliver it, this is held an acceptance by anticipation, and the writer is liable for whatever sum, within the capability of the stamp, shall be written upon it. In Lord IVORY's note to Erskine, it is stated that the person thus signing a blank stamp, or, as it is called, a skeleton bill, is liable to a *bonâ fide* onerous indorsee; and by decisions since pronounced, it is settled, that he is liable also to the drawer, it being held, that if the holder has truly given value for a skeleton bill, it is of no consequence whether he appear upon it in the character of drawer or indorsee. This important doctrine is fully stated and illustrated in the following cases:—*Smith v. Taylor*, 27th February 1824; *Lyon v. Butter*, 7th December 1841; *Grassick v. Farquharson*, 8th July 1846. A skeleton bill is thus, in the words of an English writer, "a letter of credit for an indefinite sum," limited only by the operation of the Stamp Acts.

2 S. 755.

4 D. 178.

8 D. 1073.

CONDITIONAL
AND PARTIAL
ACCEPTANCE.

We have seen that a drawee may attach a condition to his acceptance, which, in order to be available, must appear upon the bill. When a conditional acceptance is given, the holder should notify its terms to the other parties liable, and obtain their consent; or, if he prefers trusting to the liability of the other parties, he may refuse a qualified acceptance, protest the bill,* and give notice of dishonour, in the manner which we shall afterwards explain. When a partial acceptance is given, the holder may accept of that; but he must protest and give notice, in order to preserve his recourse.

ACCEPTANCE
supra PROTEST,
FOR HONOUR.

When the drawee has no funds belonging to the drawer, but is willing to prevent dishonour of the bill, and to undertake the immediate liability with relief against the drawer, he accepts with a declaration, that it is for the honour of the drawer. This must be embodied in an instrument. It is called acceptance *supra* protest; and is a mode of acceptance which may be adhibited by any party, in the event of the refusal or bankruptcy of the drawee, for the honour of the drawer or of any indorser. In all these cases notice is to be given to all concerned, in the same way as if dishonour had taken place. The effect of acceptance *supra* protest is to preserve recourse

* See note, p. 353.

to the acceptor after payment against the party for whose credit his acceptance is interposed.

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If a drawee, who has funds belonging to the drawer, shall refuse acceptance, he is liable in damages, and, notwithstanding his refusal, he becomes debtor to the payee, or other holder of the bill, because the draft upon him is an implied assignation of the funds, and the protest upon his non-acceptance is legal intimation to him of the assignment; *Gordon v. Anderson*, 9th December 1712. The creditor

REFUSAL TO
ACCEPT.

in the bill is preferred, therefore, as we have already seen, to a posterior arrester; *Gavin v. Kippen & Co.*, 17th November 1768; *Campbell, Thomson, & Co. v. Glass & Son*, 28th May 1803. Without acceptance, however, there cannot, of course, be summary diligence against the acceptor, since his name does not appear upon the bill. If the

M. 1490.

M. 1495.

M. voce "Im-
plied assigna-
tion," Appx.
No. 2.

drawee fails either to accept or to pay after, or without, acceptance, the drawer who has received value is liable to the payee or other creditor; and this recourse is available to the holder, whether he may have paid the value before dishonour or after it. Accordingly, in *Robb v. Rhodes*, 21st February 1811, one, who had indorsed a bill without giving or receiving value when he indorsed, and merely for the purpose of adding to it the weight of his credit, having been forced upon the failure of the acceptor to pay the contents, was found entitled to recover from the drawer, who had originally received the value.

Hume, p. 68.

Hitherto we have viewed the bill of exchange and promissory note chiefly as if continuing until maturity in the hands of the original drawer or payee. But a great purpose, engrafted, as we have seen, upon these instruments, and chiefly upon inland bills, is the use of them as a means of credit, converting future claims into present available funds. In accomplishing this purpose, they pass through various hands, and we are now to consider the rules by which their transmission is regulated.

Transmission of bills and notes.—As bills and notes are more highly privileged in Scotland than in England, by the ease and rapidity of the execution by which they are enforced with us, so in the English Jurisprudence these instruments are distinguished by this peculiarity, that they alone of all the rights which are termed choses in action—that is, rights not by possession, but by power of recovery—are capable of being assigned, the power of assignment being, according to Blackstone's expressive phrase, the life of paper credit. The transference of a bill or note exhibits the simplest mode of written transmission known to the law. When it is payable to the bearer simply, or to a payee *nominatim* or bearer, it may be transferred by

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INDORSATION,
BLANK AND
SPECIAL.

mere delivery. When the bill is drawn in the ordinary form in favour of the drawer, or other specified payee, with or without the words "or order," the payee may transmit it by indorsation—that is, by writing his name *in dorso*, and ordering the contents to be paid to the indorsee, (which is called a special indorsation,) or by merely indorsing his name without any order, which is as effectual to the indorsee as if he were named, and implies a power to him, if he chooses, to insert an order of payment in his own favour. Such insertion is, however, unnecessary, both by the common law and according to the declaratory enactment contained in the Act 1696, cap. 25, which, as we have seen, exempts indorsations of bills from the nullity attached to writs blank in the creditor's name. A special indorsation, in order to warrant summary diligence, must name the indorsee. So, an indorsement to the agent of a bank at Macduff was accordingly held insufficient to warrant diligence, because no individual was named; *Fraser v. Bannerman*, 21st June 1853. Indorsation, like acceptance and drawing, may be effectually made by the indorser's procurator, whose authority may either be written, or reared upon facts and circumstances. In the appeal case, already referred to, of *Davidson v. Robertson and others*, 4th July 1815, Lord ELDON said, that "a power of indorsing *per* procuracion did not require a special mandate, but might be "proved by inference from facts and circumstances." Special indorsation has this advantage, that it designates the indorsee named as the holder, and the bill is not transferable, unless the indorsee so named shall again indorse it; while the blank indorsation is attended with the risk, that if the bill shall be lost, and the proceeds paid to one who has found or stolen it, an onerous and *bonâ fide* holder is entitled to recover the contents; * *Scott & Co. v. The Kilmarnock Banking Company*, 27th February 1812. Here, bills of the value of £800 were discounted to a stranger by the Kilmarnock Banking Company. It appeared eventually, that these bills had been lost on their way to the indorsee for whom they were truly intended. It was doubted, whether the bankers had exercised the diligence incumbent on them; but, after a remit to bankers in Edinburgh, the Court found them entitled to recover, whereby the loss fell upon the purchaser, who was the payee and indorser of the bills. An important exception to the doctrine just laid down has been introduced by the 16 & 17 Vict. cap. 59, which in its 19th section enacts, that a draft or order drawn on a banker payable to order on demand, if purporting, when presented, to be indorsed by the payee, shall be a sufficient authority to the banker to pay, and it shall not be incumbent on him to prove the authenticity of the indorsement.

RESTRICTED IN-
DORSATION.

When it is desired that the indorsee alone shall receive the con-

* See note, p. 341, *in fine*.

15 D. 756.

3 Dow's App.
218.

F. C.
See *infra*, p.
340.

tents of the bill, and that he shall not have the power to transfer it, this is accomplished by a restricted indorsation ordering payment to "A. B. *only*," or "A. B. *for my use*." Here the contents are payable to A. B. alone, and he cannot indorse.

It is scarcely necessary to observe, that an indorsation obtained by fraud, force, or fear, is reducible. Upon that subject reference need only be made to what has already been said as to the effect of these exceptions when taken to the validity of deeds, the principles then stated being equally applicable to bills and notes. The case of *Miller v. Kippen*, 9th December 1848, is an example of presumptions of fraud held relevant to throw suspicion upon the *bona fides* of the holder of a bill, and note of suspension was passed without caution or consignment.

It is presumed, that the indorsee has given value, although the indorsation do not bear "for value;" *Auchinleck v. Millar*, 15th February 1715; and, therefore, he has recourse against the drawer, or other indorser, if the acceptor fails to pay; and, where there are successive indorsers, the holder has recourse not only against the party who indorsed to him, but against all whose names appear upon the bill, whether as drawer or indorsers, each being liable for the whole contents, in the same way as if he had granted a separate bill or promissory note to the holder. Hence indorsement was early called *redrawing*, indorsation being equivalent to a new bill by the indorser. Every indorser is thus an additional security, and liable *in solidum*. This doctrine will be found strongly stated from the Bench in the case of *King v. Creichtons*, 11th June 1839. Indorsation infers a full liability, not subject to any latent qualifications, and not controlled by any consideration as to its primary purpose or otherwise, which does not appear upon the instrument. Accordingly, the drawer of a bill having indorsed it, and left it with the acceptor to serve him as a fund of credit with a certain person, the acceptor passed it for value to a different person not cognizant of the purpose for which it had been drawn and indorsed, and the drawer was found liable to the holder for the contents; *Kilgour v. Braid*, 18th December 1800. When one indorses a bill or note improperly—that is, without the payee having transferred it by indorsation, the person thus improperly indorsing renders himself simply an obligant along with the granter; and so one who thus indorsed a promissory note was found liable for its contents; *Don v. Watt*, 26th May 1812. And a party indorsing a bill, when there was no previous indorsation, was held to be an acceptor; *Watters*, 7th March 1818. When an indorser intends to exempt himself from recourse, he must add to his indorsation the words "*without recourse*," which will save him from further liability. This, it will be observed, is a fresh instance of the remarkable simplicity of these instruments, and of the facility with which important

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OF BILLS AND
NOTES, *contd.*

11 D. 233.

HOLDER'S RE-
COURSE AGAINST
DRAWER AND
INDORSERS.
M. 1537.

Forbes on Bills,
P. 80.

1 D. 923.

Hume, p. 44.

F. C.

F. C.

INDORSATION
WITHOUT RE-
COURSE.

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INDORSATION
AFTER DATE OF
PAYMENT.

effects are produced by the use of short conventional phrases universally understood.

A bill may be indorsed either before or after acceptance; and bills and notes may be effectually indorsed after the date of payment, and, if there be no marks of dishonour on the face of the instrument, indorsation after the date of payment confers upon the indorsee a right to all the statutory privileges of execution within the period of prescription, nor is the indorsee subject, when there are no marks of dishonour, to objections pleadable against the drawer or indorser; * *Wilkie v. Wilson*, 30th November 1811; *Crawford v. Robertson's Trustees*, 30th June 1814. In these two cases there was no mark of dishonour upon the bill, nor does it appear that there had been any protest. But, even though they have been protested, overdue bills are negociable; *Macadam v. Macwilliam*, 14th June 1787; and they may be transferred by indorsation even after the protest has been recorded; *Frier v. Richardson & Co.*, 18th November 1806. But, after dishonour marked upon a bill, the indorsee who acquires it is liable to every exception which can be established against the indorser; and, therefore, a bill having been indorsed after it was noted—that is, marked by a notary as protested—the acceptor was allowed to refer to the indorser's oath, whether he had given value—a reference which would not have been allowed, if the bill had not been noted, since a *bonâ fide* indorsee is not liable to objections pleadable against the indorser in general; *Allan v. Galli*, 5th June 1829.

The indorser of a bill or note is effectually re-invested by possession with the indorsations subsequent to his own delete, and he may again transmit it by his original indorsation; *Fairholms*, 7th January 1752; *Adam v. Watson*, 13th December 1827. But re-indorsation to a prior indorser gives no action against the re-indorser; *Dickie v. Gutzmer*, 27th February 1828.

INDORSATION
DOES NOT
TRANSMIT
REGISTERED
PROTEST.

In order to complete the subject of the transmission of bills, we may notice here, that, although an overdue bill or note is itself transferable by indorsation within the period of prescription, the indorsation does not carry right to a protest taken and registered. The registered protest being a decree, it can be transmitted only by assignation, in which the bill, as the ground of debt, is conveyed along with it. It is the opinion of Mr. Erskine, that the assignee of a bill and registered protest is not subject to the objections pleadable against the cedent. Baron Hume, however, remarks, that, "when the "bill and registered protest are conveyed by assignation, the very

Inst. iii. 2, 31.

* It has been recently enacted by the Mercantile Law Amendment Act, that, "When any "bill of exchange or promissory note shall be indorsed after the period when such bill of "exchange or promissory note became payable, the indorsee of such bill or note shall be "deemed to have taken the same subject to all objections or exceptions to which the said "bill or note was subject in the hands of the indorser;" 19 & 20 Vict. cap. 60, § 16.

"form of the transaction proves that this bill has not been bought as a bill in the common course of trade, but has been acquired as an ordinary document of debt after inquiry into the circumstances, and by a deliberate and probably advantageous bargain. In these circumstances, there is no sufficient reason why the assignee should not hold the claim of debt subject to the same exceptions as his author." The latter view is confirmed by the decision, in the report of which it is expressed; *Brown v. Ralston*, 5th June 1793. Hume, p. 40.

In transferring a bill and protest by assignation, attention must be given to the position of the parties as regards the sale and purchase of the right, one assignation being insufficient under the Stamp Laws, when there has been a double transfer; *Oliver v. Halliburton*, 22d June 1822. 1 S. 519. It may be noticed here, that, when bills have been ranked upon a sequestrated estate, the dividends are not transmissible by indorsation of the bills, but by assignation only; *Wallace, Hamilton, & Co. v. Campbell*, 8th June 1821; affirmed on appeal, 23d June 1824. 2 Sh. App. 467. 1 S. 53.

The indorsee is not entitled to refuse payment from a third party not upon the bill; *Rainnie v. Milne*, 7th March 1822. 1 S. 377.

A bill drawn payable to the bearer, or indorsed by the payee, is regarded as so much cash in point of transmissibility; and, as money passes from hand to hand without earmark, and not burdened with any claim to those parting with it, so a bill or note carries right to the sum which it contains, free of all burdens which do not appear upon its face. The debtor, therefore—that is, the acceptor of a bill, or the granter of a note—cannot pay with safety to any but the holder, and if he shall make payment to the original creditor—that is, the drawer or payee—he will, notwithstanding, be liable in second payment to a *bonâ fide* indorsee, even although the indorsement may have been made after payment to the indorser; *Erskine v. Thomson*, M. 1501. 12th December 1711. Here the acceptor produced receipts for partial payments made to the drawer before indorsation, but he was, nevertheless, found liable in full payment to the indorsee. To the same effect is the case of *Fairholm v. Cockburn*, 24th June 1714. M. 1506. Nor will a back bond or any other separate discharge or acquittance from the drawer exempt the acceptor, who must pay in whatever hand the bill appears; *Douglas v. Elliot*, 7th January 1757. Here the acceptor held an obligation of relief from the drawer, but was found, notwithstanding, liable to an onerous indorsee. And it is no defence against an onerous indorsee, that the acceptor received no value, or that he has a claim of compensation against the first indorser, which would have extinguished the debt had he continued to hold it; *Stuart & Gordon v. Campbell*, 31st January 1699. And, as a bill is cash to the holder, the indorser's creditors cannot attach the fund by arrestment even prior to the indorsation, as we have already seen in the case of *Smith v. Home*, 5th December 1712. The principle, that a

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BILLS RE-
GARDED AS
CASH IN POINT
OF TRANSMIS-
SIBILITY.
RESULTS OF
THIS RULE.

M. 1501.

M. 1515.

M. 1497.

M. 1502.

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TRANSMISSI-
BILITY OF BILLS,
contd.
1 S. 77.

3 S. 325.

3 S. 80.

8 D. 810.

F. C.

See *supra*, p.
336.

M. vocs "Bill
of Exchange,"
App^s. No. 8.

bill is an independent obligation of payment, and clear of all questions as to the transaction out of which it arose, will be found illustrated in the following cases:—*Bruce v. M'Kenzie & Balfour*, 21st June 1821. Here a bill had been accepted for the price of good seed. The seed proved to be bad, and the acceptor raised an action of damages, and pleaded compensation in the suspension of a charge upon the bill. But the Court found the letters orderly proceeded—that is, that the charge was regular, and the acceptor not entitled to refuse payment upon such a ground. The case of *M'Gill v. Carrick, Hutchison, & Co.*, 27th November 1824, is to the same effect, shewing that diligence upon a bill cannot be stayed to await the decision of an action of damages arising out of the transaction in which the bill has been granted. Upon the same principle, in *Henderson v. Elliot & Foster*, 20th May 1824, the Court refused to suspend a decree for the amount of a bill upon the acceptor's averment, that, upon an accounting between himself and the chargers, the bill would be found to be paid, but without any allegation that payment had been made of the bill libelled on. In the case of *Alexander v. Monteath*, 6th June 1846, a bill having been accepted for rent, due to a party whose factor drew the bill and afterwards charged for the amount, the Second Division of the Court suspended the charge upon caution, clear evidence being adduced that the debt was compensated as between the debtor and the principal party, although the factor, whose name alone appeared upon the bill, alleged that he was individually an onerous holder, having retired it with his own funds from the bank, where it had been discounted on behalf of the principal. It would be dangerous to infer an alteration, or even a relaxation, of the general rule from this decision, the circumstances of the case having been very special, and the general rule recognised in the opinion of the Judges as undoubted. We have already seen, in the case of *Scott v. Kilmar-nock Banking Company*, 27th February 1812, that a bill having been lost, and discounted to a stranger, the *bonâ fide* indorsee was entitled to recover; and, as we have thus the strongest illustration of the peculiar character of a bill as cash passing from hand to hand, and not clogged with latent defects, it will be useful to refer also to *Lambton & Co. v. Marshall*, 21st June 1799, where the holders of a bill who had paid value for it were found entitled to recover from the drawer, although it appeared that the bill had been stolen. The ground of the decision is stated to be, that there is no *rei vindicatio* against onerous holders of bills and bank notes—that is, if I acquire right by purchase to a bill or note, no one can deprive me of it, upon the ground that it was stolen from him.* There is no rule which the practitioner has more frequent occasion to apply than the general doctrine that illiquid claims—i.e. claims not constituted by decree or

* See note to p. 341, *in fine*.

by bond or bill, cannot be set off against what is due by bond or bill. This rule is illustrated in the case of counter claims against rent due under the obligations of a lease, by *Dickson v. Porteous*, 12th November 1852. See also the case of *The Blair Iron Company v. Alison*, 13th August 1855, in which effect is given to the same rule of law. An onerous indorsee is exempt also from the plea, that the bill or note was granted for an illegal purpose or consideration, provided he be ignorant that it was so, and excepting only the case of a fundamental nullity declared by Statute, which imports a *vitium reale*. Accordingly, where a bill was granted as an inducement to accede to a composition under a sequestration, although that circumstance would have made the bill unavailable to the creditor himself, yet it was not held to affect it in the hands of an onerous indorsee, inasmuch as the Bankrupt Act then in force did not attach a specific nullity to a bill granted for this particular purpose; *Craig v. Sheills & Co.*, 15th December 1809.

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TRANSMISSIBILITY OF
BILLS AND
NOTES, *contd.*
15 D. 1.
18 D. (H. of
Lords) 49.

But, if the indorsee has not paid value, and holds merely for behoof of the indorser, he is liable to all the objections which would be available against the party from whom his right is derived; and, generally, one who acts on behalf of any party to a bill or note is entitled to no right or benefit which could not be claimed by the party whom he represents. Thus, the acceptor of a bill having been incarcerated, his agent paid the amount to the holder, and required from him an assignation with right of recourse not only against the acceptor, but also against the drawer. The Court found him not entitled to an assignation with recourse against the drawer; *Cameron v. Robertson*, 2d February 1830.

INDORSATION
IN TRUST.

It is an established rule of Law, that when the objections which are competent to bar the claim of the holder of a bill or note are stated, viz., that he has paid no value, or that he is acting *malâ fide* and in collusion with another party against whom objections would lie, if the claim were made in his name, these objections can only be proved by the writ or oath of the holder himself; as regards the drawer, for example, the acceptor cannot suspend a charge at his instance, unless he offer to prove by his writ or oath that the bill was for the accommodation of the drawer himself; *Cargill v. Gould & Co.*, 12th February 1852. This rule is founded upon the consideration, that the benefit of summary diligence would be rendered nugatory, if it might be suspended upon allegations of non-onerosity, *mala fides*, or collusive indorsation, which might be stated by any one desirous of obtaining the delay requisite for an ordinary proof.* The

PROOF OF NON-
ONEROSITY.

14 D. 485.

* In the case of *Bannatyne v. Wilson*, 13th December 1855, it was held, in an action upon a bill, that circumstances of grave suspicion are sufficient to elide the presumption of *bona fides* in favour of the indorsee of a bill, and to expose him to exceptions pleadable against his cedent, and to let in circumstantial evidence of want of consideration. And it was observed on the

18 D. 230.

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contd.

rule is, no doubt, attended with occasional hardships, but that is an evil inseparable from the system, which could not continue to exist in a beneficial and effective form, if debtors were allowed to stay diligence by allegations not capable of immediate verification; and the knowledge of the risk must, in a large measure, give to this the character of a self-correcting evil, by rendering parties cautious, and slow to occupy a position which may subject them to the payment of liabilities not their own. The important principle now stated is illustrated by the case already cited of *Wallaces v. Barrie*, 29th November 1793, where it was observed on the Bench, that "the law presumes that the acceptor gets value, and this presumption can only be taken off by writ or oath of party." The privileges of onerosity are acquired, although the value be not paid until the bill or note is overdue, and, accordingly, one who was originally an indorser without value paid or received, having retired the bill three months after the date of payment, was found entitled to do summary diligence against the acceptor; *Kidston v. Stead & Son*, 21st January 1809. The cases of *Wilkie* and *Crawford*, which have been already referred to, illustrate the same principle.

M. 1484.

F. C.

Supra, p. 338.

ONEROSITY.

We have already found, that bills and notes may be effectually drawn and indorsed, although they do not bear to be for value. When the bill bears that it is for value in the hands of the drawee, it has never been doubted, that a presumption is thus raised, which can only be taken off by the writ or oath of party, that the acceptor is the true debtor; and this is strongly exemplified in the above cited case of *Wallaces*, where effect was given to the presumption, although the description of the value was false. Upon the authority of the case of *Cunningham v. Agnew*, 4th July 1711, Mr. Erskine indicates an opinion, that, when a bill or note does not expressly bear value in the hands of the person drawn upon, the presumption is in his favour, and he will be entitled to recover from the drawer. The mo-

M. 1484.

M. 1531.

Inst. iii. 2, 30.

7 Wil & Sh.
App. 333.

Bench that even an onerous indorsee, if *in malâ fide*, would have been in the same position. In the case of *Hunter v. George's Trustees*, 13th May 1834, the Lord Chancellor observed:—"It has been insisted, that it is to be presumed in all cases, that an indorsee holds the character, and is entitled to the privileges of a *bonâ fide* onerous indorsee, until that presumption is removed by the confession of party or by writings. But an indorsee who has obtained a bill by fraud, or to whom it has been indorsed by collusion with the indorser for the purpose of cheating creditors, would not be likely to confess that he was not a *bonâ fide* holder, or to furnish any written evidence that would destroy his right to sue on the bill indorsed to him. Such a rule, if generally acted on, would be a cover for every species of iniquity. The modern cases shew, that evidence raising a suspicion of fraud prevents the application of this rule, and lets in circumstantial evidence to prove the want of *bonâ fide* consideration for the indorsement." See also *Mackenzie v. Hall*, 21st February 1855. "Where any bill or note has been lost, stolen, or fraudulently obtained, the holder of such bill or note suing or doing diligence thereon shall be bound to prove that value was given by him for the same; but such proof may be made by parole evidence;" 19 & 20 Vict. cap. 60, § 15.

17 D. 460.

dern practice, however, does not countenance this distinction, and the acceptor is held to be the proper debtor by force of his acceptance merely, and the doctrine stated from the Bench in the case of *Wallaces*, that the law presumes the acceptor to have received value, *M. 1484.* is of general application, and was strongly illustrated in the case of *M'Dowall v. Duke of Douglas*, June 1731, where the value described *M. 1541.* in the bill never arose. When the bill is in favour of a third party, the words "*value received*" are interpreted to import, that value has been received by the drawer from the payee. In this case, these words have been regarded in England as ambiguous, since they may *Byles, p. 61.* mean either value received by the drawer of the payee, or by the acceptor of the drawer. But the former, which is the construction applied in Scotland, is preferred for this reason, as stated by Lord ELLENBOROUGH, that it is more natural "that the party who draws the " bill should inform the drawee of a fact, which he does not know, " than of one of which he must be well aware." As the payee is with us the creditor in the bill, so the presumption is in his favour, although the words "*value received*" are not used. This was expressly decided in *Scott v. Laing*, 19th March 1707. The presumption *M. 1535.* of value given by the payee to the drawer does not hold where the tenor of the bill is inconsistent with that construction; and, when a bill was drawn payable to A. for £600 "*value in account as per advice*," that was held to express value between drawer and acceptor, and not pleadable against the payee, so as to affect the rule that no value can only be proved by writ or oath; *Wilson & Philp v. 10 D. 560.* *Loder*, 1st February 1848.

It was formerly held incompetent to constitute a donation in the *DONATION AND* form of a bill, and, accordingly, in the case of *Weir v. Parkhill*, 7th *LEGACY BY BILL.* January 1737, action was refused upon a bill as gratuitous; and the *M. 1413.* same doctrine was applied to legacies, which it was held incompetent to grant in the form of a bill; *Dowie v. Millie*, 2d February 1786, *M. 8107.* and previous cases. These decisions were attributable, probably, in a large measure to the way in which bills and notes were at an early period regarded as exclusively applicable to mercantile transactions, and to a feeling of insecurity connected with them before the year 1772, when their effect became limited by the six years' prescription. Even before the date of *Dowie's* case other decisions had been pronounced, not entirely reconcilable with these in principle; and the tendency latterly has been to relax the operation of the rule rejecting bills granted on donations and legacies. Thus, in *Barbour & Blackwood v. Hair*, 8th *M. 6097.* February 1753, bills, indorsed on deathbed by a husband to his wife gratuitously, were found properly delivered, and effectually transferred, to her. In *Adam v. Johnstone*, 2d December 1782, a donation *mortis M. 1416.* *causâ* was effected by a bill in this ingenious manner. The donor granted his acceptance to two third parties, who, in consideration

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- thereof, granted their bill to the donee. This transaction was supported, and it was observed on the Bench, that, in consequence of the statute rendering action upon bills necessary within six years, there was less danger of fraud than previously, when they might be sued upon any time within forty years, and that, consequently, those documents were to be construed with less suspicion and strictness now than formerly. In *Steel's Disponees v. Wemyss*, 18th December 1793, a gratuitous draft upon a bank was found available to the party to whom it was given, after the granter's death; and in *Reid v. Milne*, 29th November 1808, a bill drawn by a person *moribundus* on his debtor, and delivered with a written statement that it was intended as a gift, was found effectual to the payee. By the two decisions last quoted in conjunction with that of *Barbour* it is established, that a donation may be effected by a draft upon a third party, or by indorsing a bill. The case does not appear to have occurred in late years of a donation constituted by an acceptance, and, as the last decisions upon that point are negative of the competency, it must still be regarded as at least doubtful whether an acceptance granted as a donation would be sustained. There is no doubt, that, in the hands of an onerous indorsee, it is not a valid objection to a bill that it was accepted as a donation or legacy; *Shaw v. Farquhar*, 24th November 1761.
- M. 1409.
- Hume, p. 60.
- M. 1444.

EFFECT OF PAY-
MENT BY ACCEP-
TOR.

Effect of payment of bill.—When payment of a bill is made by the acceptor, the obligation by him and the drawer to the payee is thereby extinguished. And, if the drawer is himself the payee, the effect of payment by the acceptor will depend upon the state of accounts between the parties. If the acceptor was debtor to the drawer, the debt will be compensated, and so extinguished, by the amount of the bill. If the acceptor was not debtor, then he will have a claim, and an action to enforce it, against the drawer, for the amount of the bill, and of the commission allowed by the usage of merchants. It may be assumed, as an unfailing criterion for determining who is ultimately liable for the payment of a bill, that the responsibility will be fixed upon him who is truly the debtor. But here it is to be remembered, that the Law has established its own presumptions of liability, which, in the absence of other evidence, will subject first the acceptor, and afterwards the indorsers in succession. That rule is clear. The acceptor is the proper debtor, liable even to a party who has indorsed for the accommodation of the drawer, if that party retires the bill; *Beveridge v. Liddell & Co.*, 14th January 1852. Whenever, therefore, one becomes a party to a bill in a capacity which does not represent his true position in the transaction, as when one accepts for the accommodation of the drawer, or indorses in order to accommodate the indorsee, then it is of primary importance that he obtain and preserve

indisputable evidence that he is not the proper debtor, as otherwise the presumption of law may saddle him with a liability truly belonging to another. When proper evidence is produced, however, the law will certainly impose the debt upon the proper debtor. Thus, a bill having been accepted for the drawer's accommodation, and paid on behalf of the acceptor's representatives by their agent, who took a title to the debt in his own name by assignation, he was found entitled to do diligence against the drawers; *Napier v. Wilson & Sons*, 16th November 1810. By the opinion of the Court, the decision is put upon the same footing as if the diligence had been used by the acceptor himself against the drawer, which in the circumstances they held to be competent. It is instructive to compare this case with that of *Cameron v. Robertson*, 2d February 1830, formerly referred to, where, the acceptor's agent having retired the bill, the Court would not grant him a title to charge the drawer, there being no evidence that the acceptor was not the proper debtor. When the acceptor pays a bill, he is entitled to receive delivery of it; *Thomson v. Izat*, 1st December 1841; and it is of great importance that he should obtain delivery. In the case just referred to, the acceptor would have remained liable for payment if he had not got possession of the bill. In *Waddell's Trustees v. Scotts*, 24th May 1833, bills found in the repositories of the creditor were enforced against the acceptors, notwithstanding their allegations of payment, of which, however, they had not sufficient evidence. And the case of *Irvine v. Lang*, 6th March 1840, is very strong to the same effect, the acceptor of a bill, found in the deceased drawer's repositories, having been subjected in payment at a distance of years, notwithstanding strong averments, and various presumptions, of payment. In the recent case also of *Milne v. Donaldson*, 10th June 1852, the presumption of payment by the proper debtor was found not to hold, where the bill is found in the repositories of the drawer. When a foreign bill is paid, delivery of all the parts should be required.

If a bill past due be found in the acceptor's hands, his possession raises a presumption that it was paid by him, although it may bear no receipt to that effect, according to the maxim, *chirographum apud debitorem repertum presumitur solutum*. If it can be shewn, however, that the acceptor has obtained possession improperly, the Court will order him to deliver it up; *Edward v. Fyfe*, 26th June 1823. In order to avoid the risk of question, the acceptor, when he retires a bill, or the granter a note, ought to obtain a receipt or discharge written upon it. By special exemption such a receipt requires no stamp. When a bill is delivered to a wrong party, the party so delivering it must procure its restoration to the rightful owner, or pay the contents; *Vignes v. Edinburgh and Leith Bank*, 16th June 1842. After payment by the acceptor of a bill or granter of a promissory note, it

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EFFECT OF PAY-
MENT BY ACCEP-
TOR, contd.

Hume, p. 65.

s S. 430.

4 D. 136.

11 S. 655.

2 D. 804.

14 D. 849.

2 S. 431.

4 D. 1424.

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M. 1447.

cannot be re-issued, unless it be in the extraordinary case, that it contains an obligation by the drawer to repay. Of this there is an example in *Grierson v. Earl of Sutherland*, 28th June 1727; and after having been retired by the acceptor the bill was held indorsable, so as to transfer a claim for the repayment.

EFFECT OF PAY-
MENT BY IN-
DORSEE.

When a bill is paid not by the acceptor but by an indorser, who will be entitled to recourse against the proper debtor, he must take a receipt acknowledging the amount as paid by him, the presumption of law being, when there is no receipt, or one in general terms, that the payment was made by the acceptor; and, therefore, although the bill may have been paid by one entitled to recourse against the acceptor, and may be found in his possession or repositories, the presumption of payment by the acceptor will prevail, unless there be evidence of the contrary. Effect was given to that presumption in the cases of *Brown v. Kerr*, 14th June 1809; *Webster v. Thomas*, 15th January 1819.* When a partial payment, however, has been made, and acknowledged on the bill without specifying who made it, the receipt for that amount may be made special when the bill is fully retired, so as to enable the party paying to sue for the whole amount; *Soutar's Representatives v. Soutar*, 29th June 1827. Payment, like acceptance, may be made *supra* protest, but the protest must be taken at the time of payment, and not afterwards.

Hume, p. 62.
F. C.

5 S. 876.

In conclusion on the subject of payment, when various bills of the same debtor are held, each one must be accounted on for itself as regards the relief of other parties; so, when a drawer or indorser has paid in part of a particular bill, and the holder afterwards recovers the full amount of that bill from the proper debtor, he is bound to repeat the partial payment, although other bills of the same debtor may not be fully satisfied; *Patten v. The Royal Bank*, 28th March 1853.

15 D. 617.

Hitherto we have assumed the bill or note to be in every respect regular, and to be paid when due. If the acceptor fails to pay, then there is a legal resource available against him, and all the others liable, provided the instrument is in itself unobjectionable, and that it has been duly negotiated. Before describing the Statutory privileges of execution, therefore, let us enquire whether the instrument is entitled to them by its own integrity, and by observance of the rules of negotiation necessary to preserve recourse.

17 D. 143.

* A general receipt of payment indorsed upon a bill operates as an extinction of the debt in favour of the acceptor, unless the contrary be proved by his writ or oath; *Martin v. Smith*, 8th December 1854. Where the acceptance of a bill has been cancelled, without any averment that this was done fraudulently or by accident, an indorsee, suing the acceptor upon the allegation that he had retired the bill, and allowed the scoring of the signature, for the credit of the acceptor, must prove this allegation, which is one of a contract of loan, by the defender's writ or oath; *ibid.*

Vitiation of bills and notes.—In order that a bill or note may retain its Statutory privileges, it must be entire, and not vitiated by alteration or addition; and, where an alteration or erasure appears, which has not been authorized or acquiesced in by all parties concerned, that infers a fundamental nullity, rendering the instrument incapable either of being the ground of diligence, or of serving as a document of debt. These serious consequences result from an alteration in any material part—as the date, the sum, or the term of payment, or in any other part inferring in any manner a change of the original contract. In the following cases bills were vitiated by an unauthorized alteration of the date :—*Murchie v. Macfarlane*, 1st July 1796. Here the date was changed from 7th to 17th June by the interpolation of the figure 1, with an appearance different from that of the rest of the bill. The diligence was in consequence suspended. In *Allan v. Young*, 5th March 1800, the date was altered to a day six months after the original date, in order to avoid prescription, and the bill was in consequence found inadmissible as evidence of a debt. In *Russell v. Macnab*, 14th December 1822, the date had been altered from 1811 to 1814, and the bill was consequently adjudged to be “a null document.” In *Hamilton v. Monteath*, 1st December 1824, the figure 5 in the date 25th December had been superinduced; but it could not be discovered whether it had been written on an erasure, or whether there had ever been another figure under it. The Court held the superinduction to be a vitiation sufficient to annul the bill as an actionable document. In the case of *Armstrong v. Wilson*, 2d June 1842, the day of the month was written upon an erasure, without the knowledge or consent of parties, and the bill was in consequence reduced. The date is *in essentialibus*, even where it does not affect the time of payment, as in a bill payable on demand; *M’Rostie v. Halley*, 2d March 1850.

VITIATION IN
DATE.

M. 1458.

M. voce “Bill,”
Appx. No. 10.

2 S. 88.

3 S. 345.

4 D. 1347.

12 D. 816.

An alteration in the term of payment, not authorized by the parties, is equally fatal; *Murdoch, Robertson, & Co. v. Lee, Rodger, & Co.*, 26th December 1801. In this case a bill for £1000, payable on demand, was, without authority, altered to payable one day after date, in order to make it bear interest. In an action founded on this bill, which was a renewal of a previous one, the Court of Session gave judgment for the amount of the original bill and interest; but the House of Lords dismissed the action as grounded on the altered bill, reserving to the parties to bring an action on the previous one. The Lord Chancellor observed, that in England it would have been a sufficient answer to the action as brought, “to have stated, that the bill, in consequence of the alteration, was not the contract of the parties; that the alteration of that bill (a voluntary, if not a criminal, act of the pursuer) had annihilated it, and it could not be restored or made a ground of demand.” In *Hamilton v. Kinnear &*

VITIATION IN
TERM OF PAY-
MENT.i. Bell’s Com.
391.See *infra*, p.
349.

4 S. 102.

PART II.
CHAPTER V.

Sons, 17th June 1825, upon the report of a banker and engravers, that a bill had been vitiated by alteration, erasure, or otherwise, the allegation being, that the term of payment had been altered from 1826 to 1825, the Court suspended a charge without caution or consignation.

VITIATION IN
THE SUM.
12 S. 613.

The sum of a bill is also a vital part, and any unauthorized interference with it destroys the instrument; *Maclean v. Morrison*, 20th May 1834. In this case the sum was, after acceptance, altered from £24 to £26, of which alteration the acceptors were not proved to have received notice, and they were in consequence found not liable for payment even of the sum for which they admitted that they had accepted, and although one of them had received a part of the proceeds.

VITIATION IN
THE ADDRESS.

4 S. 40.

A bill is also vitiated by an unauthorized alteration of the address, affecting the position of the parties. So, a bill having been addressed to one of the acceptors expressly "*as cautioner*," and these words having been erased, and the words "*conjunctly and severally*" introduced, the acceptors were found not liable; *Robertson v. Annan*, 27th May 1825. Here it will be observed, that no benefit would have resulted to the drawer by the alteration, the acceptor, who signed as cautioner, being as fully liable in that capacity as if he had accepted conjunctly and severally. The effect of the alteration, therefore, would have been to cut off the claim of relief of the one acceptor against the other, and in this respect it implied an alteration of the contract.

VITIATION IN
THE SIGNA-
TURES.
12 S. 110.

F. C.

12 D. 1184.

A bill may also be vitiated by interference with the signatures of the drawers and indorsers; *M'Ewen v. Graham*,^r 21st November 1833, where a name being erased below that of the apparent acceptor of a bill, the Court refused to allow action upon it. In *Callender v. Kilpatrick*, 10th December 1812, a bill was held to be vitiated by the deletion of the name of one of two drawers, who was also an indorser. This had been done by mistake, but it affected the question of relief between the two drawers, and was held, therefore, to extinguish the obligation. In *Thomson v. Bell*, 5th July 1850, a past due bill found in the repositories of the deceased drawer, torn into three pieces, was pasted together, and a charge given upon it, but the Lords held it to be no warrant for summary diligence.

ALTERATION IN
BILLS AS AF-
FECTED BY THE
STAMP LAWS.

2 S. 446.

Another grand source of nullity from alterations in bills exists in the operation of the stamp laws. Under these it is held, that any material alteration upon a bill or note, after it is issued, is in effect the creation of a new instrument, and the document is, therefore, rendered void for want of a new stamp. This is a defect which the consent of parties cannot remedy; *Fleming v. Scott*, 1st July 1823. Here, after delivery, the original drawer and indorser deleted his signature as drawer, and another party signed as drawer and first

indorser. The Court considered the bill null as a document of debt, both at common law and under the Stamp Act. It was attempted afterwards to establish a claim upon the same bill in an ordinary action, but without success, as will be seen in the report of the case of *Young's Trustees v. The Paisley Bank*, 10th March 1831. In *Miller, M'Kay, and Co. v. Robertson*, 21st May 1835, a promissory note, altered in the date after delivery, was adjudged void. In *Homes v. Purves*, 7th June 1836, a promissory note and bill were held null, in consequence of a new obligant having subscribed both, after they were issued as completed instruments.

We have already seen the House of Lords reserving to a party non-suited, when founding upon a vitiated bill, rights of action upon a previous bill, of which it was a renewal. The case of *Soutar's Representatives v. Soutar*, 29th June 1827, is an example of a claim established upon an original bill, when the renewal was vitiated.

It is thus firmly established, that alteration in a material part of a bill renders it null at common law as against parties not consenting to the change, and null under the Stamp Acts, although authorized by the parties, if made after the instrument is issued. But, if the alteration be made before acceptance, the bill will not be vitiated, even although the change be in a material part, although it may prevent it from forming the ground of summary diligence. In the case of *Bryce v. Dickson*, 16th November 1810, it was, no doubt, held, that a bill was vitiated by an alteration in the term of payment, although proof was offered that the alteration was made in order to correct a mistake at the time of writing out the bill. But this decision has not been followed as an authority, and it is in opposition to the general tenor of the judgments pronounced both before and since. In *Henderson v. Hay*, 20th February 1802, a bill, dated 1799, was first by mistake made payable in 1780, which was corrected to 1800. The Court did not regard this as a vitiation, but as a mere blunder by the writer of the bill at the time of writing it. In *Whitehead v. Henderson*, 19th February 1836, a proof was allowed of an averment, that an alteration in the date of a bill had been made by the writer of it with consent of the acceptors, at the time it was written. The proof failed, but the allowing of it shows that the averment was considered relevant to obviate the plea of vitiation. In *Sutherland v. Morrison*, 1st July 1823, an alteration in the date of a bill, made by the acceptor himself, was held not to be a ground even for suspending summary diligence. The recent decision of *M'Rostie v. Halley*, 18th November 1849, shews a proof allowed before answer, that the date of a bill, though written upon an erasure, was the true date, and that it was so written when the bill was made and delivered. This was allowed, however, only to support the instrument as a document of debt, the Court holding the *ex facie*

ALTERATION IN
BILLS BY CON-
SENT OF PAR-
TIES BEFORE
ISSUE.

F. C.

M. 17,059.

14 S. 544.

2 S. 442.

12 D. 124.

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CHAPTER V.

12 D. 816.

IMMATERIAL
ALTERATIONS
IN BILLS, &c.
F. C.

2 S. 225.

2 S. 360.

15 S. 1202.

4 D. 62.

2 Bell's App. 81.

ALTERATION OF
BILL ARISING
FROM NEGLIGENCE OF AC-
CEPTOR AND
INDORSERS.

M. 1660.

2 S. 13.

irregularity sufficient to deprive it of the privilege of summary execution. This was clearly settled in a subsequent stage of the same case.

There are various decisions to the effect, that immaterial alterations do not affect the validity of a bill or note. In *Mill v. Russell*, 16th January 1810, an indorsee, having through ignorance written his name upon the face of the bill, drew his pen through it. The Court regarded this as an innocent blunder, and refused to suspend a charge. In *Beattie v. Haliburton*, 18th February 1823, the place of payment of a bill being sufficiently expressed without reading part of it, which was written upon an erasure, the Court refused to suspend the diligence upon that ground. In *M'Ara v. Watson*, 3d June 1823, the Christian name of an indorsee in a special indorsation having been written *William* instead of *Thomas* by mistake, was corrected. The Court found the bill insufficient to warrant summary diligence, but reserved to the charger his claim in an ordinary action; and, in *Commercial Bank v. Paton*, 28th June 1837, a promissory note having been granted bearing to be for "*value in trust account*," and the name of the truster added after it was issued, the Court held the bill not to be thereby vitiated. The addition of addresses to the indorser's names, although erroneous and copied into the protest, does not vitiate the bill, because such additions are immaterial, and not being *in substantialibus* do not interfere with the operation of the bill; *King v. Creighton*, 23d November 1841; affirmed 11th May 1843.

In considering the effect of alterations upon bills, it is necessary to keep in view the principle applied to skeleton bills, which, we have seen, are those issued blank with the acceptor's signature, and carry an implied authority to render him liable to any amount, which the stamp is capable of bearing. Upon the same principle it has been held, that, when a bill is issued in such a state, that the sum can be altered without necessarily exciting suspicion, such a fraud will not exempt from liability to a *bonâ fide* onerous holder the acceptor and indorsers, who have issued and transmitted the instrument in a form liable to such misuse; *Pagan v. Wylie*, 19th June 1793. In this case, a bill accepted for *eight* pounds was altered into *eighty-four*, by interpolation upon a blank space after the word *eight*. It was held by the Court, that "the circumstance of leaving a blank must be held as a tacit mandate from the parties whose names were upon the bill, entrusting the holder with the power of filling it up, and they refused, therefore, to suspend a charge for the full amount." And, in the case of *Stewart v. Bird*, 14th November 1822, the same principle was applied, where a bill was alleged to have been altered in the date from 4th to 14th March; but as this was not done in a suspicious manner, and the document was *ex facie* unexceptionable, a bill of suspension was refused. But, when such an alteration is obvious,

and capable of detection by ordinary vigilance, the indorsee, who purchases a document thus observably vitiated, will himself suffer the loss; *Watsons v. Thomson and Co.*, 27th June 1798. Here a bill accepted for *sixty* pounds was altered so as to bear the words *one hundred and sixty*. But this was done in such a manner as to give the sum an "awkward and crowded appearance," and the Court, therefore, suspended the charge, thus throwing the loss upon the bankers who had discounted the bill. The effect of an alteration, as depending upon its obviousness, or capability of detection by ordinary care, is well shewn in the case of *Grahame v. Gillespie and Co.*, 27th January 1795, where of two bills, in both of which the amount had been fraudulently increased, one was found not actionable, the alteration upon it being obvious, while the other, which was not suspicious in appearance, was sustained as affording the indorsee a claim for the increased value.

PART II.
CHAPTER V.
Hume, p. 42.

M. 1453, and
Bell's Fol.
Cases, 105.

Due negotiation of bills and notes.—In order to preserve its privileges and recourse against all the parties liable, a bill must not only be entire and unvitiated, it must also be duly negotiated—that is, the holder must present it for acceptance, when that is necessary, and after acceptance, or without it, if it be unnecessary, he must present it at the proper time and place for payment; and upon failure to accept or to pay, he must protest,* and give notice to the parties liable. These steps constitute due negotiation, and we are now to point out the rules by which they are conducted.

It is chiefly in bills drawn payable after sight, that acceptance is requisite, there being no *data* for fixing the time of payment of bills after sight, until the exhibition to the drawee is made, and the date of it determined, either by his acceptance with a date subjoined to it, or, if he refuse to accept, by a protest for non-acceptance.* The first duty, then, of one who receives a bill payable so many days or months after sight is to present it for acceptance; and here the law has allowed some degree of latitude. A bill of this description is regarded as a letter of credit in favour of the payee, as to which he may use discretion within moderate bounds in presenting it, so as to make the date of payment suitable to his own convenience. A prudent man of business will, no doubt, present without any delay, in order to avoid all risk of question or accident; but the cases of *Innes v. Gordon*, 7th February 1735, and *Andrew v. Syme and Co.*, 21st November 1759, shew, that immediate presentment is not indispensable. In the one case, a bill at fourteen days' sight was retained by the holder ten days before presentment for acceptance, and a loss having arisen by the acceptor's absconding, it was held that there had been due negotiation. The other case is to the like effect. But,

PRESENTMENT
FOR ACCEPT-
ANCE.

M. 1562.

M. 1584.

* See note, p. 353.

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CHAPTER V.

PRESENTMENT
FOR ACCEPT-
ANCE, *contd.*
M. 1593.

although bills after sight are thus exempted from the most rigorous rules of negotiation, they must be presented within a reasonable time, to be determined by usage and the circumstances of the particular case, the question of due presentment being one for a jury. In the case of *Falls v. Porterfield*, 17th June 1766, the holders of a bill, payable three days after sight, were found to have lost their recourse, by allowing it to lie in the drawee's hands unaccepted for nearly a month. Promissory notes, also, from their nature, as applicable more properly to the constitution of a debt than its instant recovery, are not subject to rigorous rules of negotiation in this particular, unless their nature or terms, or the particular circumstances of the transaction, are such as to impose immediate presentment as a duty on the payee. Accordingly, in the case of the *Leith Banking Company v. Walker's Trustees*, 22d January 1836, a promissory note payable on demand was held to be duly negotiated, although not presented for payment till more than five months after its date, Lords MONCREIFF and MEDWYN marking the difference between a bill, of which the object is instant payment, and a promissory note, which is rather intended to serve as evidence of a debt, and in this case was plainly not intended to be immediately enforced.

When bills are payable at a certain time after date, or upon a day specified, it is unnecessary to present them until they are due, because the term of payment is precisely fixed by the instrument itself; *Fergusson v. Malcolm*, 16th February 1727; and, in the case of *Jamieson v. Gillespies*, 28th June 1749, a bill, dated 21st February, and payable 18th May, not having been presented for acceptance, and only protested for non-payment when due, was found, upon the report of merchants in London and Edinburgh, to have been duly negotiated. This is so clearly fixed, that, in the case of *The National Bank v. Robertson*, 3d February 1836, bills drawn at sixty days' date not having been presented until due, a party who had guaranteed the regular acceptance of them, was held to be liable. But, while this is the rule as regards recourse against the drawee, a different principle takes effect in regulating presentment as a duty owing by one party to another; and, when a bill is negotiated through an agent, or transmitted to a payee with instructions to present, then presentment for acceptance is incumbent; and, in *Dunlop v. Hamilton & Co.*, 16th January 1810, a bank agent was held liable for the contents of a bill payable four days after date, in consequence of neglect to present it for acceptance. This decision is upon the principle stated in the opinion of English counsel, which is given in the report, that "the acceptance of a bill adds greatly to its security, and, if it is transmitted by the holder to his agent before it becomes due, it can be for no other reason than that the latter should make use of it as may be most beneficial to his principal, and, consequently, that he

14 S. 332.

M. 1558.

M. 1579.

14 S. 402.

F. C.

“should procure immediate acceptance, in order to give the greatest possible value to the bill.”

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CHAPTER V.

PROTEST FOR
NON-ACCEPT-
ANCE AND NON-
PAYMENT.

When a bill is not accepted upon presentment, it is the duty of the holder to cause it to be protested for non-acceptance. The protest fixes the date of sight by the drawee, and, when the date of payment so ascertained shall arrive, it is still the holder's duty to demand payment, as the drawee may be prepared to pay, though he was not prepared to accept. If payment shall not be duly made when the bill is so presented, then another protest will be taken for non-payment. When an accepted bill, or one not requiring acceptance, is not duly paid, it is protested for non-payment only.*

A bill is due strictly upon the day of payment which it names, and, when it is payable so many days or months after date or sight, the day of the date of the bill is excluded in the calculation. In the case of payment at so many months, the calculation is by calendar months, and not by lunar months. The creditor is entitled to protest upon the day following the day of payment thus ascertained. But by the common usage of mercantile nations, with the exception of France, where the indulgence has been abrogated by the Code, a certain number of days, called days of grace, are allowed to the creditor, to make his demand, and protest. The number of the days of grace varies in different countries. At Frankfort-on-the-Maine it is four days; in Leipsic, five; in Venice, six; at Dantzic, ten; at Hamburgh and Stockholm, twelve; at Rome, fifteen; and Genoa, thirty. In Scotland and England, the number of days of grace is three, which are reckoned exclusive of the day on which the bill is payable, but inclusive of the last day of grace. The days of grace are not a privilege to the debtor, but are indulged to the creditor, who may protest his bill upon any one of them, without losing recourse against the drawer and indorsers. But, in order to preserve recourse against these parties, the protest must be taken upon one of the days of grace.* Accordingly, a protest was found incompetently taken upon the day of payment, the non-payment not being fully established until that day is entirely elapsed; *Charles v. Skirving*, 2d July 1788; and, if the protest be delayed till after the last day of grace, then recourse is lost against the drawer and indorsers. This is expressly enacted by the 41st section (still in

DAYS OF
GRACE.

M. 1614.

* Now, by the Mercantile Law Amendment Act, 19 & 20 Vict. cap. 60, § 13, “Where any inland bill of exchange shall be presented for acceptance or payment, and the same shall be dishonoured by not being accepted or paid; or where any promissory note shall be presented for payment, and dishonoured by not being paid, it shall not be necessary that a notarial protest shall be taken on such bill of exchange or promissory note, in order to preserve recourse against the drawer or indorser of such bill or promissory note respectively; but it shall be sufficient to prove such presentment and dishonour, to the effect of preserving recourse, as aforesaid, by other competent evidence, either written or parole: Provided always, that nothing herein contained shall be taken to affect the necessity for a notarial protest in order to entitle the holder of any bill or note to proceed with summary diligence thereon.”

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CHAPTER V.

DAYS OF GRACE,
contd.

M. voce "Bill
of Exchange,"
Appx. No. 14.

M. voce "Bill,"
Appx. No. 13.

1 Comm. 411,
note 6.

M. 1612.

See p. 357.

Supra, p. 334.

16 S. 406.

PLACE OF PRE-
SENTMENT.

6 D. 17.

1 & 2 Geo. IV.
cap. 78.

force) of the Act 12 Geo. III. cap. 72, which declares, "that all inland
" bills and promissory notes shall be protested, in like manner as
" foreign bills, before the expiration of the three days of grace, other-
" wise there shall be no recourse against the drawers and indorsers."*
See the case of *Jarron v. Smith & Co.*, 17th June 1803. Here a bill
was dated 30th April, and payable three months after date. The
protest was taken on 3d August, and the holder maintained that it
was properly so taken, the bill being dated upon the last day of April,
and payable, as he argued, upon the last day of July. The report bears,
that, by the practice of merchants, the 2d of August was the last day
of grace, so that a bill, drawn upon 30th April, at three months is
payable upon 30th July. The case of *Fergusson & Co. v. Belsh*, 17th
June 1803, is an example of recourse lost by neglecting to protest
before the expiration of the days of grace; and Mr. Bell has preserved
a decision, *The British Linen Company v. Hepburn*, 19th May 1807,
in which a protest, not made till the day after the third day of grace,
was found too late. When the last day of grace is a Sunday, or a
holiday, the protest must be taken on the day preceding; *Smith &
Payne v. Laing, Arthur, & Co.*, 29th June 1786, and the previous
decisions there referred to. By these authorities it is conclusively
established, that a bill or note must be protested for non-payment
upon one of the days of grace, in order to preserve recourse against
the indorsers and drawer. It is different, however, as regards the
acceptor or granter, and the protest may be taken at any time within
six months from the falling due, to the effect of recording such pro-
test, and using summary diligence against them. We have already
seen, that, when a bill drawn payable at sight is accepted without
any date appended to the acceptance, the date of the bill is the date
of payment, and, to preserve similar recourse against the acceptor in
that case, therefore, the protest must be within six months of the date
of the bill; *Moffat v. Marshall*, 31st January 1838.

When no place of payment appears upon the face of the bill or note,
the general rule is, that it must be presented, whether for acceptance
or for payment, to the drawee or granter personally, or at his resi-
dence. By holding out a particular place as that where he is to be
found, and designating it as his office for all purposes, a party may,
by his conduct, fix that as the proper place of presentment for accept-
ance; *Robertson v. Burdekin*, 14th November 1843. But, if a place
of payment is named, that forms a condition of the instrument,
and presentment must be made at the place specified, otherwise
recourse will be lost against the drawer and indorsers. If the
drawee be dead, presentment should be made at the house where
he last resided. By the Statute 1st & 2d Geo. IV. cap. 78, it is

* See note, p. 353.

enacted, that, when a bill is accepted, and a place of payment named by the acceptor, that shall be deemed a general acceptance, which means that the acceptor will be liable as usual, although presentment may not be made at the place specified. But, if the acceptor specifies a place, and adds the words, "*and not otherwise,*" or "*and not elsewhere,*" this is a qualified acceptance, and the acceptor will not remain liable in the event of the holder failing to demand payment, upon the day the bill falls due, at the place specified. If a place of payment, therefore, is specified, presentment must be made, and the protest taken, at that place. If no place is specified, this must be done in presence of the acceptor, or at his residence, or, in the case of a mercantile company, at their place of business. If neither the acceptor nor his residence can be found, it does not appear to be clearly settled what course should be taken. It has been held, that a protest at the head burgh of the county of the debtor's last residence is ineffectual; *Glendinning's Creditors v. Montgomery*, 14th June M. 1449. 1745. The compilers of the Juridical Styles say, that, when the party ii. p. 14. cannot be found, the protest should be taken at the exchange and market cross, and, if he is out of the kingdom, at the market cross of Edinburgh, and pier and shore of Leith; while Mr. Thomson suggests, that it should be at the party's last residence. In a matter of doubt, p. 543. it may be advisable, where practicable, to act upon both of these suggestions. In England, the rule is, that, where the party or his residence cannot be found, due diligence must be used to discover him, and the question of due diligence is for a Jury. But, although presentment must be made at the place specified, or other proper place, it is not necessary that the place be specified in the protest; and, in the case of *Commercial Bank v. Hannah*, 24th February 1818, a pro F. C. test being challenged, upon the ground that it bore only to have been "duly protested," without specifying that it was protested at the place of payment, the Court considered the words "*duly protested*" as inferring that the protest had been taken with all the solemnities required by law, and on that ground, as well as the general practice of notaries, held the protest valid. In *Gordon v. Stephen*, 28th No- 8 D. 146. vember 1845, a bill being accepted payable at "the Bank Office in "Dundee," where there were several banks, application was made for payment at them all, and the protest bore, that it was duly protested where payable. This was challenged on the ground of the protest being indefinite, but the Court sustained it. But, when it is distinctly alleged that presentment was made, and the protest taken at a wrong place, that allegation is relevant, if proved, to nullify the diligence; *Stocks v. Miller*, 23d November 1822.

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CHAPTER V.
PLACE OF PRE-
SENTMENT,
contd.

2 S. 35.

Although the protest must be made by a notary, it is not necessary that he be present when the bill is presented, and he is warranted in making the protest upon the report of his clerk or other trustworthy

MODE OF PRO-
TESTING.

PART II.
CHAPTER V.
Hume, 76.

13 D. 376.

NOTING.*

M. voce, "Bill,"
App^x. No. 21.

EVIDENCE NE-
CESSARY FOR
COMPILING PRO-
TEST.

6 S. 150.

10 S. 853.

See *supra*, p.
355.

FORM OF IN-
STRUMENT OF
PROTEST.

person employed by him ; *Macartney v. Hannah*, 11th February 1817. In this case it was proved, that this mode of protesting, viz., upon the report of a clerk or other person, was the ordinary practice of all the notaries in Glasgow, except one, and it is believed to be sanctioned by universal usage. But, if the notary is misinformed, the party who has failed duly to present is liable for the consequences ; *Houldsworth v. The British Linen Co.*, 19th December 1850. Here a bill for grass rent having been returned by a bank to the drawer with a protest for non-payment, the bank was found liable not only for direct damage, but also for damages awarded to the tenant against the landlord for wrongous sequestration, it being proved that the bill had not been duly presented.

The protest is not generally written out in its extended form when taken. It is the practice merely to note it, which is done by the notary marking upon the face of the bill the date, his own initials, and the initials of the witnesses. Noting was decided to be sufficient negotiation in the case of *Brown & Co. v. Dunbar*, 8th December 1807 ; and the instrument of protest may be extended at any distance of time afterwards, within forty years.† But, although a notary may thus execute a protest after a lapse of time, he must have authentic evidence from which to compile it ; and, when a bill has not been noted, or other authentic memorandum of the fact preserved, by the notary, his instrument will not be held as evidence of the protest. Such evidence ought to be furnished by the notary's protocol, which was a book anciently kept by every notary as a record of his notarial acts. But the use of protocols has long been discontinued, and the noting upon the bill has been the chief, if not the only, evidence from which instruments of protest have been compiled after an interval of time. The validity of instruments so compiled as proof of the protest, (although after six months they cannot serve for diligence,) is undoubted. In *Alexander v. Scott*, 28th November 1827, instruments of protest, extended fifteen years after the noting of the bills, were sustained. Where a notarial instrument was objectionable as insufficiently stamped, a second instrument not liable to that objection was sustained, and the prior one admitted as evidence of materials for compiling the second ; *Balfour v. Lyle*, 21st July 1832. But, although instruments of protest may thus be compiled from authentic materials at any time within the period of prescription, it is necessary, with a view to diligence, that they be recorded, as well as completed, within six months of the date of payment.

When the protest is for non-acceptance, it may be at the instance of the person in custody of the bill at the time, and a protest for non-

* See *supra* note, p. 353.

† Notarial protest is now unnecessary for preserving recourse against the drawer and indorsers ; see *supra* note, p. 353.

payment may be made by a notary at the request of any one acting for the holder of the bill, the rule being, that the notary is to satisfy himself that the party making the request is the one in the bill, or one possessing his authority; but it is unnecessary that the name of the party to whom the bill has been transferred should appear *ex facie* of the protest, to shew that it was taken at his instance. So, a protest was sustained, which was taken "at the request of the "manager of the Union Bank of London;" *Elder v. Young & Co.*, 17 D. 56. 15th November 1854. Although a protest be taken at the instance of the holder, it may be extended afterwards in the name of a previous indorser who has an onerous title as by paying value to the protester; *Mackie v. Hilliard & Co.*, 15th June 1822. The protest is a very simple instrument. There is prefixed an exact copy of the bill or note with the acceptance and indorsations, if there are any. To this there is subjoined a certificate by the notary, commencing with the place and date; after which it proceeds as follows, in case of non-acceptance: "*The principal bill above copied was "in the personal presence of the above-named A.,*" (here insert the name of the drawee,) "*duly protested by me, notary-public subscribing, at the instance* of B.,*" (here insert the name and designation of the holder,) "*indorsee and holder thereof not only against the said C., "on whom the same is drawn, for non-acceptance, but also against the "drawer and indorser jointly and severally for recourse, and against "all concerned for interest, damages, and expenses, as accords, in "presence of D. and E., witnesses specially called to the premises.*" If the bill be a foreign bill, the protest is also for exchange and re-exchange. There is not time here minutely to explain these terms, but it is enough to know, that they express the loss caused by the non-payment of the bill, with reference to the expense of remitting money from the place drawn from to the place drawn upon, and in making the money, of which the payee has been disappointed, otherwise available to him at the same time and place, notwithstanding fluctuations in the premium of exchange. The remarks already made are sufficiently explanatory of the terms of the protest, and it need only be noticed, that, although the instrument mentions witnesses, there are not in practice any witnesses called to the presentment and protest of a bill. The notary, at his discretion, in accordance with the ancient form, and as a form merely, inserts any names he chooses. This practice, however extraordinary, is universal, and the cases of *Macartney v. Hannah*, 11th February 1817, and *Stevenson v. Stewart & Lean*, 14th November 1764, shew that it is judicially recognised and sustained. When the day of payment of a bill, previously protested for non-acceptance, has arrived, it must, if not paid, be protested for non-payment. This protest

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FORM OF PROTEST, contd.

1 S. 499.

Hume, p. 76.
M. 1593.

* See *Elder's case*, *supra*.

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FORM OF PROTEST, *contd.*

2 S. 622. refers to the former one, and its terms will be found in the Styles of the Juridical Society. When an accepted bill is protested for non-payment, the protest bears to be against the acceptor for non-payment of the contents, and against the drawer and other indorsers conjunctly and severally for recourse, and against all concerned for interest, damages, and expenses. It is incompetent to include protests of more than one bill in one instrument; *Napier v. Carson*, 17th January 1824.

WHO MAY ACT
AS NOTARY.

6 S. 133. The notary who protests a bill must not himself have an interest in it, or stand in the position of creditor. But the objection of relationship is not admitted to annul a protest. The objection of interest is shewn in the case of *Russell v. Kirk*, 27th November 1827, where a protest, having been taken by the acceptor of a bill, was found inept; and, in *Farries v. Smith*, 9th June 1813, the Court expressed an opinion, that it was irregular and unsuitable for the managing partner of a bank to act as notary-public in protesting bills at the instance of the bank, although a mere stock-holder would not be disqualified. A notary cannot protest a bill of which he is himself the drawer and indorser, for that is himself to certify the fact, which is to be the foundation of his own recourse; *Leith Banking Co. v. Walker's Trustees*, 22d January 1836. But, in the case of *Mackenzie v. Smith*, 23d November 1830, it was not considered a fatal objection to a protest, that the notary had formerly been a partner of the drawer, the partnership having actually terminated, although without sufficient notification. The objection of relationship was repelled in the case of *Reid v. Grindlay*, 19th November 1830, where the notary making the protest was the son of the creditor in the bill.

TO WHOM NOTICE OF DISHONOUR NECESSARY.

9 S. 31. *Notice of Dishonour.*—When acceptance or payment of a bill or note is refused, the holder must not only protest, he must also give notice to those liable in recourse. The only safe course is to notify the dishonour to all parties whom he intends to hold liable, because each party is entitled to receive notice; and, if the holder content himself with giving notice only to the party who indorsed to him, his recourse will not be preserved against the other indorsers and the drawer, if the previous indorser shall neglect to give notice. No doubt, when the indorsers in succession give notice without delay to those from whom they derived right, that will be due negotiation, and preserve the holder's recourse against the earlier indorsers and drawer, although some time must necessarily elapse before these parties are apprised by this circuitous method. In *Clarkson v. Ball*, 17th November 1831, a bill being dishonoured which had passed through the hands of five indorsers, each gave notice, and received payment from his own indorser, and thus the first indorser did not get notice until the sixth day, which would have been insufficient had he been entitled to direct notice from the party protesting. The

10 S. 17.

Court did not decide upon the objection, but it appears from the report to have been abandoned under the advice of the eminent counsel in the case. But, when the last indorser, upon receiving notice, neglects to notify in turn to the other indorsers or drawer, the holder's recourse against these parties is not preserved by his own notice given to the last indorser; *Elliot v. Bell*, 14th February 1781. M. 1606.

The notice must be explicit; it must specify and distinguish the bill protested, by its date, sum, and other particulars. The necessity of this is obvious, when we attend to the purpose of the notice, which is, that the indorser, to whom it is given, may be enabled, and may be in safety, to take steps for securing relief against the party liable to him. But it is evident that no one can hold himself safe to take steps for attaching the property of another by arrestment or other diligence, unless the description of the bill be so distinct, full, and particular, as to exclude all possibility of doubt as to its identity. Accordingly, in *Johnston v. Hogg*, 21st July 1747, a letter, intimating that the writer had drawn upon the indorser for £150, "for retiring a bill of his for that sum," was held not to be such a notification of the dishonour of the bill in question, as to entitle the pursuer to recourse. M. 1570.

With regard to the time within which notice must be given, the *dictum* of Mr. Erskine, that the dishonour must be intimated within three posts at furthest, is not of any authority, and the matter is now regulated by statute. The Act 12 Geo. III. cap. 72, declares in its 41st section, with regard to *foreign* bills, that the notification of dishonour shall be made within such time as is required by the usage and custom of merchants. Bills drawn in Scotland upon England, and *vice versâ*, are, with regard to this matter, held to be foreign bills;* and the limit of time within which the dishonour of these must be notified has not been ascertained by any decision in Scotland. In England, it is settled, that the notice must be dispatched by the post of the day following the dishonour or the intelligence of it; and this may be regarded as the rule also in Scotland. The Statute, to which we have referred, fixes the time for giving notice of the dishonour of *inland* bills by the same clause, which declares it sufficient to preserve recourse, if notice is given within fourteen days after the protest is taken; and this fixes the rule absolutely as between the holder and the drawer.† But the rule has not been held by the Court to be im-

* Now, all bills drawn within the United Kingdom on any party within the United Kingdom are to be held inland bills; see *supra* note, p. 317.

† Now, by 19 & 20 Vict. cap. 60, § 14, it is enacted, that, "Where any inland bill of exchange shall be presented for acceptance or payment, and such acceptance or payment shall be refused; or where any promissory note shall be presented for payment, and payment shall be refused, notice of the dishonour of such bill or note by such refusal to accept or pay shall, in order to entitle the holder to have recourse to any other party, be given in the same manner and within the same time as is required in the case of foreign bills by the law of Scotland."

- PART II.**
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- M. 1614.** perative as between the indorsers, and there are various decisions in which notice has been sustained as sufficient, although exceeding the period of fourteen days, where no neglect or undue delay in the circumstances was imputable; *Carrick v. Harper*, 23d May 1790; *Andrew v. Adam*, 2d June 1812. But, where there is negligence, a delay of two or three days will subject the indorser with whom it occurs; *Batchin & Birkmire v. Orrs*, 18th December 1792. Here there was a delay of two or three posts in consequence of the indorser having gone from home without leaving power to open his letters. It is to be remembered, that the Statute, by its terms, which specify the three days of grace, refers to dishonour by non-payment alone; and, accordingly, when a bill is protested for non-acceptance, the notification must be immediate.* This rule applies, too, in cases of refusal to accept, where acceptance is not necessary; *Banks v. Scott*, 13th November 1818. It is not necessary that notice be given in writing, the conveyance of the fact is the essential thing, and that may be proved *prout de jure*; *Mill v. Salkeld & Co.*, 12th November 1805. In this case verbal intimation was found sufficient; and other cases to the same effect are noticed in the report. In *Syme v. Ferguson*, 25th June 1813, the Court was clearly of opinion, that it is not necessary to intimate the dishonour of a bill in writing, and the Lord Ordinary having allowed a proof of intimation by letter, they altered, and allowed a proof generally. If notice be dispatched by post, that exonerates the holder, and preserves his recourse, although the letter is not received; *Henderson v. Duthie*, 19th January 1799; *Stewart v. Wright*, 13th December 1821. The holder must be prepared with evidence of the despatch of the notice, but the Court does not insist upon rigid and precise evidence, and will sustain a reasonable proof; and, in the cases of *Galbraith v. Warden*, 5th February 1820, and *Sandeman & Miller v. Thomson*, 12th November 1831, evidence of the regular transmission of letters from the offices of the respective holders was held sufficient proof, without a specific deposition as to the letters containing the notice, and although in the latter case there was not, as in the other, a copy of the notice retained. Again, in *Stocks v. Aitken*, 14th November 1846, no copy having been preserved, evidence by one clerk of having dispatched the notice, along with proof by other clerks of invariable practice to send such notices, was sustained as sufficient. The notice must be correctly addressed. In *Milligan v. Barbour*, 27th February 1829, the notice was held insufficient, having been addressed to "William Milligan, "Stoop"—a village close to Dumfries, which was the post town—while his residence was at "Trench," another village in the immediate vicinity of Dumfries. But a correct address will be presumed, if the contrary be not proved; *Robertson v. Gamack*, 12th December 1835.
- Hume, p. 38.**
- Hume, p. 77.**
- EVIDENCE OF NOTICE OF DISHONOUR.**
- Hume, p. 54.**
- F. C.**
- M. voce "Bill," App^r. No. 7. 1 S. 213.**
- Hume, p. 79.**
- 10 S. 4.**
- 9 D. 75.**
- 7 S. 489.**
- 11 S. 139.**

* See note †, p. 359.

Proof of dispatch by a carrier will not suffice, but the delivery must be proved; *Brown v. Kerr*, 14th June 1809.

The rules of negotiation, which we have considered, are generally applicable, and their observance indispensable, in the ordinary case. But there are a few exceptions arising from the nature of the particular instrument, or of the position and liabilities of parties.

We have already seen a promissory note payable on demand not held liable to objection on the ground of delay, although it was not presented for payment during several months; and there is a case reported by Baron Hume, *Jamieson v. Jamieson*, 12th February 1812, in which the holder of a promissory note payable one day after date was not held bound for due negotiation, but entitled to sue the indorser as well as the granter, two years after the date of payment, there having been no protest or notice.

In regard to bills, the rules of strict negotiation are not held to apply to indorsees who acquire right to them after the date of payment. In such cases it is the duty of the indorsee to lose no time in demanding payment; but, though he do not protest, his recourse will not be lost, provided he give notice of the failure to pay within a reasonable time; *Young v. Forbes*, 29th June 1749. Mr. Erskine holds, that an indorsee, who receives a bill as security for a debt, is not bound duly to negotiate, and a decision to that effect was pronounced by the Court in *Murray v. Grosset*, 16th February 1762; but the decision was reversed by the House of Lords, who also reversed a similar judgment in *Reid and Co. v. Coats*, 21st February 1794.

Notice of dishonour is not requisite to preserve recourse against a party, although he be the drawer or indorser, if the bill was granted for his accommodation, in which case he is the proper debtor, and lies under the same obligation to provide for the bill as the acceptor does; *Goldsmid and Moxon v. Macneil, Stewart, and Co.*, 26th May 1814. In this case the proof that the bill was for the drawer's accommodation failed; but it is clearly stated in the opinion of the Court, that an indorsee is relieved from the obligation to notify dishonour, by proving that the bill was for the accommodation of the drawer. Upon the same principle, co-obligants in a bill liable in relief to each other are not entitled to insist for due negotiation *inter se*; *Jarron v. Smith and Co.*, 17th June 1803.

The question, who is the proper debtor, will generally solve the question of liability, or right to notice, and the drawer and indorser are to be held entitled to notice, whenever the bill has not been for their benefit. In *Orr v. Turnbull*, 19th June 1792, a party, who had indorsed a bill to accommodate the drawer, was held entitled to notice of dishonour, and liberated by the want of notice. In *Alexander v. Scott*, 28th November 1827, parties bound by a guarantee

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Hume, p. 62.

EXCEPTIONS TO
STRICT RULES
OF NEGOTIA-
TION.STRICT NEGOTIATION NOT
REQUIRED,
WHERE BILL
INDORSED
AFTER DUE.

M. 1580.

M. 1592.

M. 1620.

NOR IN ACCOM-
MODATION
BILLS.

F. C.

M. voce "Bill,"
Appx. No. 14.RULE FOR DE-
TERMINING WHO
ARE ENTITLED
TO NOTICE.

Hume, p. 36.

6 S. 150.

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1 D. 827.

WAIVING OF
NOTICE.

2 S. 782.

14 S. 999.

Hume, p. 34.

NEGOTIATION,
WHERE DRAWEE
HAS NO FUNDS
OF THE DRAWER.

M. 1569.

M. 1613.
M. voce "Bill,"
Appx. No. 18.

8 S. 121.

M. 1574.

F. C.

for the amount of bills were found not liable for such of the bills as had not been duly negotiated. But the guarantor himself is not entitled to notice of dishonour; *Watt v. The National Bank*, 28th May 1839.

When the absence of notice is occasioned by delay granted at the request, or with the concurrence, of a drawer or indorser, he is not entitled to plead the want of notice. So, where the indorsee with consent of the indorser entered into a composition-settlement with the granter of a promissory note, the necessity of negotiation was held to have been thereby waived; *Watson v. Livingstone*, 10th March 1824; and the plea was held barred also in the case of a bill, which the drawer induced the holder to delay in presenting when due, and the drawer was found liable; *Cairns's Trustees v. Brown*, 23d June 1836. Nor is a party entitled to notice, when he shows by his correspondence or otherwise, that he is aware of the fact of dishonour, notice being requisite, not as a solemnity to be observed invariably, but only for information. So, where the payee of the promissory note informed the holder before the date of payment, that the granter was bankrupt, and requested him to raise diligence, there was held to be no necessity for notice of dishonour; *Davidson v. Campbell's Creditors*, 25th February 1791. Again, when the party drawn upon has no funds of the drawer, the holder will not lose his recourse, although he do no diligence, for in this case the drawer suffers no damage by the want of negotiation. This doctrine is stated in the case of *Littlejohn*, already referred to. See also *Macadam v. Macwilliam*, 14th June 1787, and *Hill v. Menzies and Anderson's Trustee*, 5th June 1805. But the rule is otherwise, if the bill was not for the drawer's accommodation, but for that of the indorsee; *Henderson v. Ker and Johnston*, 24th November 1829, in which case it is evident, that the drawer has an interest to receive notice, in order to operate his relief against the party ultimately liable. But, if the want of funds is caused by the acceptor's bankruptcy, that does not remove the necessity of strict negotiation, and the holder will lose recourse if he neglect it; *Langley v. Hogg*, 17th June 1748; *Calder v. Lyall*, 22d December 1808. If the drawer have become bankrupt, notice of dishonour ought, notwithstanding, to be made to himself or his trustee, if one has been appointed, in order to preserve recourse upon his estate.

By the statute 6th and 7th Will. IV. cap. 58, it is enacted, that it shall not be necessary to present bills accepted *supra* protest for honour, or which have a reference marked upon them in case of need, to the acceptors for honour, or the referees, until the day after they become due; and, if such acceptors or referees do not reside where the bill is payable, it is sufficient to dispatch it for presentment for payment by the post of the day after the day of payment.

Execution upon bills and notes.—Bills of exchange and promissory notes are distinguished from all other writings by the privileges which they enjoy for enforcing payment. We have seen, that, in deeds containing a consent to registration for execution, the charge against the debtor must be upon fifteen days, unless a charge of six days be expressly consented to. And this charge of six days is the highest privilege of execution which, according to practice, formal deeds can enjoy even by the consent of parties. Now, bills of exchange and promissory notes, although they contain no registration clause, and no expressed consent to any execution whatever, are, notwithstanding, invested with this highest privilege of having their execution enforced upon a charge of six days. This was first conferred upon foreign bills by the Act 1681, cap. 20, which proceeds upon the preamble, “how necessary it is for the flourishing of trade, that bills or letters of exchange be duly paid, and have ready execution.” It ordains, that, when a foreign bill either to or from this realm, is protested for non-acceptance or non-payment, the protest, having the bill of exchange prefixed, shall be registrable within six months after the date of the bill in case of non-acceptance, and after the falling due thereof, in case of non-payment, in the books of Council and Session, at the instance of the payee or his order against the drawer or indorser, where for non-acceptance, and against the acceptor where for non-payment, to the effect it may have the authority of the Judges interponed, that letters of horning upon a simple charge of six days, and executorials necessary, may pass, in the same manner as upon registered bonds or decrees of registration proceeding upon consent of parties. But it is provided, that, if the protests be not registered within six months, they shall not have summary execution, but be only recoverable by ordinary action. The Statute then sets forth provisions, to which we have already adverted, making interest chargeable from the date of the bill when protested in consequence of non-acceptance, and from the date of its falling due, in case of non-payment; and it concludes with a provision for the recovery of exchange, re-exchange, damage, interest, and expenses, before the Judge-Ordinary. This statute is the foundation of summary diligence upon bills and notes; and it is material to observe, that it confers the privilege only upon foreign bills; and that, while in case of non-acceptance it gives recourse against the drawer or indorser, the acceptor alone is made chargeable upon a registered protest for non-payment. Under this statute, it is competent, where a bill has been protested for non-acceptance, to proceed with diligence against the drawer for recourse before the term of payment; *Cowan v. Key*, 20th June 1795.

By the Act 1696, cap. 36, the provisions of the Act 1681, cap. 20, were extended to inland bills, and, therefore, the benefit of summary

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CHARGE OF SIX
DAYS.

PRIVILEGE OF
SUMMARY EXECUTION CONFERRED ON FOREIGN
BILLS BY 1681,
c. 20.

M. 1621.
PRIVILEGE OF
SUMMARY EXECUTION CONFERRED ON
INLAND BILLS
BY 1696, c. 36.

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12 Geo. III.
c. 72.

diligence for non-payment in these also was competent only against the acceptor. It so continued until the year 1772, when, by the Act 12 Geo. III. cap. 72, § 42, it was provided, that summary execution should pass not only against the acceptors, but also against the drawers and the whole indorsers jointly and severally, excepting where the indorsation is qualified to be without recourse, reserving to the drawers and indorsers their several claims of recourse against each other. The statute last quoted was in this respect rendered perpetual by the 23d Geo. III. cap. 18, § 55, upon the ground that its provisions had been of great advantage to trade and commerce in Scotland.

23 Geo. III.
c. 18.

PRIVILEGE OF
SUMMARY EXECUTION
CONFERRED UPON
PROMISSORY
NOTES.
M. 12,259.

Before the statute 1772, various questions had arisen touching the legal character of promissory notes, which had not been included in the Acts 1681 and 1696 *per expressum*, and were on that ground not held entitled to the privileges of execution, as will be seen on reference to the case of *Greig v. Green*, 25th January 1771. At an earlier period, as we have already seen, promissory notes were not held probative from want of the solemnities. Subsequently they were received as probative on the ground of being *in re mercatoriâ*, but not entitled to the privileges of bills, and so not subject to the rules of due negotiation; and, lastly, the privilege of execution was denied to them until conferred by statute. This was done in 1772 by the 12 Geo. III. cap. 72, just referred to, and rendered perpetual by the other statute already cited. By section 36 of the Act 1772, it is enacted, that the same diligence and execution shall be competent, and shall proceed, upon promissory notes, whether holograph or not, as upon bills of exchange and inland bills, and that promissory notes shall bear interest, and pass by indorsation, and the indorsees have the same privileges as the indorsees of bills. Promissory notes are also included in the other clauses of this Act, already quoted, and they are now, therefore, in all respects in the same position with respect to enforcement as bills of exchange and inland bills.

Upon these regulations it is to be remarked, that, as they are statutory, they cannot be modified or extended by the authority of any Court. It is incompetent, therefore, for the Court of Session to authorize registration of a protest after expiration of the six months allowed by the Act. This was refused, where the creditor had been prevented from doing timeous diligence by an interdict used by the debtor; *North British Bank v. Thoms*, 18th July 1848. Again, although the statute authorizes registration only within six months from the date of the bill in case of non-acceptance, or after the falling due in case of non-payment, and, although a bill payable on demand is exigible at its date, yet it has been held that summary diligence upon a bill payable on demand is competent within six months after a demand has actually been made, although more than six

10 D. 1505.

months may then have elapsed from the date of the bill; *Bon v. Lord Rollo*, 21st February 1846—a decision followed in the case, already cited, of *M'Rostie v. Halley*, 16th November 1849.

Under the statutes to which we have referred, execution upon bills and notes was in all respects followed out in the same manner as upon registered deeds and other decrees forming the foundation of summary diligence. The extract of the registered protest was a warrant, like any other decree, for obtaining letters of horning, upon which arrestment was immediately competent, and after a charge of six days the creditor had recourse against his debtor's moveables by poinding, and against his person by caption. These forms, as we have already seen, are still competent, but they have given way in practice to the shorter and less expensive procedure introduced by the 1st and 2d Victoria, cap. 114, by § 1 of which it is enacted, that the extract of the protest of a bill or promissory note recorded in the books of Council and Session shall contain a warrant to charge the debtor to pay or perform. As we have already examined the mode in which this statute provides for the enforcement of decrees, whether registered in the books of the Supreme Court or in those of the Sheriff Court, it is unnecessary to recapitulate these particulars here, since they are the same in all respects with regard to bills, as in the case of other voluntary and judicial obligations.

The Act 1772 contains in § 43 the important provision, that summary execution shall be competent to the indorsee of a bill, although the protest is not in his name, and although the bill is not reconveyed to him by indorsation, provided he produces a receipt or a missive letter from the protesting indorsee; this is an important privilege, and the use of it is very frequent in practice. When a bill, for instance, is protested by a bank, one of the indorsces liable to the bank receives the bill and protest, along with an acknowledgment by the bank that he has made the payment, and thereupon he is entitled to register the protest, and obtain an extract with warrant for diligence at his own instance. This privilege is available to the payee and indorsers of a promissory note upon payment by them to the protesting indorsee and his receipt being obtained; *Kennedy v. M'Whirter*, 26th June 1849. The receipt, however, must in every case be distinct, and so framed as clearly to show that the value has been paid to the protesting holder; and diligence was found null, at the instance of a party paying to the bank which had taken the protest, because the receipt was signed by a party with the word *agent* merely subjoined to his name, there being thus no evidence on the face of the proceedings that the receipt was truly the act of the bank; *Summers v. Marianski*, 16th December 1843.

It is only the principal sum, and interest due on it, that can be recovered by summary diligence; the reason of which is, that no sum

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12 D. 1310.

12 D. 124.

WARRANT TO
CHARGE CON-
TAINED IN EX-
TRACT OF THE
PROTEST.

INDORSEE MAY
USE DILIGENCE,
THOUGH PRO-
TEST NOT IN HIS
NAME.

11 D. 1198.

6 D. 286.

THE EXPENSES
NOT RECOVER-
ABLE BY SUM-
MARY DILI-
GENCE.

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can be recovered by diligence unless by the authority of a Judge; and since exchange, damages, and expenses, are not ascertained at the date of registration, there is not, and cannot be, any decree for these, a bill containing no penalty like a bond. But the statute 1681, cap. 20, expressly reserves the right to sue for these in an ordinary action. Therefore, when the principal sum and interest are paid by the debtor after the use of diligence, but not the expenses, the creditor must give up the bill, since all that is claimable under it has been paid. But he ought to retain the extract protest and other steps of diligence, to form the foundation of his claim in an ordinary action for the expenses, and, if need be, for damages, &c.

PRECAUTIONS
TO BE OBSERVED
IN USING DILIGENCE UPON
BILLS AND
NOTES.

Referring generally to what has already been said on the subject of execution or enforcement of obligations, we shall here only notice one or two points, which require special attention where the diligence is upon bills or notes.

There is occasion, in doing diligence upon bills, to be careful to ascertain the identity of the parties against whom it is directed. With regard to the drawer and indorsers, the instrument itself rarely contains more than their mere names, and, if the diligence should be directed against a wrong party of the same name, serious consequences may ensue, as a party erroneously charged may sue for damages. Care must be taken to preserve the bill or note, for, although diligence issues on the protest, inconvenience and loss may result, if the bill cannot be produced to support the charge. In the case of *Muir, Wood, and Co., v. Sibbald and Harrower*, 12th May 1820, a charge was suspended, where the charger was unable to produce the bill. A different decision was given in *Turnbull v. M'Kie*, 26th February 1822. But in the latter case the grounds of the decision are not stated, and, as in the case of *Muir, Wood, and Co.*, the point appears to have been carefully debated and considered, it will be the safe course in every view to act with the same care as if that decision formed the fixed rule on the subject.

Hume, p. 80.

1 S. 353.

TRANSFERENCE
OF REGISTERED
PROTEST TO
PRIOR INDORSER.

Hume, p. 75.

It was formerly held competent for an indorser, who had paid to the last indorsee, to obtain horning at his own instance on a protest recorded in the name of the indorsee, and a receipt by him to the indorser, the receipt operating as an implied assignation; *Scott v. Stewart*, 11th June 1816. According to the principle of that decision, an indorser, paying upon a receipt by a protesting indorsee, would appear to acquire right to the extract, and to be entitled now to obtain a fiat for diligence in his own name under the 7th section of the 1 and 2 Vict. cap. 114. But, looking to the altered form of the decree under that enactment, the safer course would be to transfer it by a formal assignation.

12 D. 1016.

In the recent case of *Don v. Kealey*, 13th June 1850, it was

attempted to exempt the acceptor of a bill from summary diligence, upon the ground that, although a domiciled Scotchman, his acceptance had been given in England, and was, therefore, a foreign inland bill. But the Court held summary diligence competent, as being the law of the country where the instrument was to be enforced. And, in *Mackenzie v. Hall*, 12th December 1854, summary diligence was found competent in Scotland upon a bill, neither drawn, nor accepted, nor payable in Scotland; and it was held, that in suing on such a bill in Scotland the parties are subject to the rules of Scotch law as to limitation of proof, &c., the general principle being, that all that relates to the *remedy* is governed by the *lex fori*, where the question is raised. Questions of *right*, however, will be regulated by the *lex loci contractus*. A foreign protest of a bill is a good ground for summary diligence in this country, if made according to the usages of the foreign country; *Elder v. Young & Co.*, 15th November 1854, already cited.

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SUMMARY DILIGENCE COMPETENT ON FOREIGN BILL.
17 D. 164.

17 D. 56;
supra, p. 357.

Prescription of Bills and Notes.—Although bills and notes do not form the ground of summary diligence, if protests be not taken and recorded within six months, yet they do not lose their privileges in other respects, until the period of prescription has run; and they continue, therefore, to pass as cash by indorsation, as we have already seen, until six years from the term of payment. The limitation of six years was introduced by the 37th section of the Act 12 Geo. III. cap. 72, which bears, that no bill or note shall be of force or effectual to produce any diligence or action, unless such diligence shall be raised and executed, or action commenced, within the space of six years from and after the terms, at which the sums in the said bills or notes became exigible. It is necessary to attend to the precise words of the Act, in considering what steps are sufficient to keep alive a bill or note, after the expiration of six years, in its full power, as a ground of diligence or of action.

PRESCRIPTION OF BILLS AND NOTES.
12 Geo. III. c. 72 § 37.

The conditions are with regard to diligence, that it shall be *raised and executed*, and with regard to an action, that it shall be *commenced*, within six years from the day of payment. Now, as diligence must be raised and executed, the prescription is not interrupted by merely taking and registering a protest; *Scott v. Brown*, 12th December 1828. Nor was the prescription avoided by the further step of raising letters of horning, for that is diligence raised but not executed; *Armstrong v. Johnstone*, 16th May 1804. And this gives the rule by which we are to be regulated under the 1 and 2 Vict. cap. 114, for, as the extract under that statute with its warrant is precisely equivalent to the registered protest and horning under the former practice, it is plain that the obtaining of an extract under the recent statute will not interrupt prescription, unless execution follow.

SEXENNIAL PRESCRIPTION, HOW INTERRUPTED.
7 S. 192.

M. 11, 140.

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9 S. 723.

9 S. 180.

9 S. 753.

M. 11,127.

16 D. 600.

16 S. 177.

17 D. 1144.

11 S. 397.

5 S. 705.

F. C.

11 D. 370.

An example of prescription effectually interrupted by diligence executed will be found in *Fraser v. Urquhart*, 11th June 1831, and also in *Henderson v. Stewart*, 14th December 1830, where the charge was upon a Sheriff's precept. And, where the prescription is interrupted by the execution of diligence, the effect of that interruption is not confined to the diligence actually done: It preserves the bill as a ground of new diligence or action after six years; *Mac-lachlan (McKirdy's Executor) v. Thomson*, 16th June 1831. Prescription is effectually interrupted by the production of the bill as the ground of a claim in a judicial competition, as in a process of ranking and sale; *Douglas, Heron, and Co. v. Richardson*, 26th November 1784; *Lindsay v. Earl of Buchan*, 17th February 1854; or in a multipointing; *National Bank v. Hope*, 5th December 1837; and by producing it and pleading compensation upon it in a suspension; *Ross v. Robertson*, 20th July 1855. In the case of *Ettles v. Robertson*, 15th February 1833, prescription was held to be avoided by the production of a bill in a trust arrangement, and the recognition of it as a debt in the trust-deed and infestment. This, however, cannot be regarded as an interruption of prescription under the statute, but as the legal effect of establishing the debt upon the trust, and so rendering it liable to the rules of common law. This judgment, we have already seen, was reversed upon appeal, but the reversal was founded solely upon the stamp-laws. Production in a sequestration interrupts prescription by the express provision of the Act 2 & 3 Vict. cap. 41, § 26. But such production must be in strict conformity with the terms of the statute, as is shown by the case of *Crawford's Trustee v. Haig*, 25th May 1827, where interruption was held not to have been effected by production of the bill in the hands of the preses of a meeting, because the preses was not one of the persons to whom production was directed to be made by the Sequestration Act then in force. The preses is included, along with the interim factor, sheriff-clerk, and sheriff, in the statute 2 & 3 Vict. cap. 41; but the decision shows the importance of an exact compliance with statutory directions, whatever they may be. In the case of *Brodie v. Sheddan*, 20th February 1821, an attempt was made to make a bill probative after six years, on the ground that the prescription had been interrupted by sentence of outlawry against the debtor, but it was successfully answered, (1), that, although sentence of outlawry had suspended the power of enforcing the party's civil rights, it had not extinguished them, and that, having obtained letters of relaxation, he was now entitled to state the plea; and, (2), that the statute was imperative. The Court assoilzied the defender. Application for a warrant against the debtor in a bill as *in meditatione fugæ* does not interrupt prescription; *Boag v. Fisher*, 17th January 1849.

The sexennial prescription is calculated by reckoning from the last day of grace, in bills payable at a fixed date, or at a certain time after date or sight. This was settled in *Douglas, Heron, and Co. v. Grant's Trustees*, 19th November 1793, which, as regards that finding, was affirmed on appeal. But, when the bill is payable on demand, the prescription runs from its date, even though no demand have been made; *Stephenson v. Stephenson's Trustees*, 16th June 1807. In this case the Judges were divided, some of them considering, that there was no term from which prescription could run, until a demand was made, and the time thereby fixed at which the sum was exigible. But the decision was by the greater number considered agreeable to the general scope of the statute, which is to prevent the use of bills and notes as permanent securities.

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DATE FROM
WHICH PRE-
SCRIPTION IS
CALCULATED.
M. 4602.
M. voce "Bill
"of Exchange,"
App^x. No. 20.

But, although bills and notes are thus rendered useless, after six years, as grounds of diligence or action, the debt which they contained is not extinguished by the sexennial prescription, the only effect of the prescription being, that the bill or note ceases to be evidence of the debt, which may still, notwithstanding, be proved by the writ or oath of the debtor. This is expressly provided by § 39 of the Act 1772, which declares it lawful and competent at any time after the six years to prove the debts contained in bills and notes, and that the same are resting and owing, by the oaths or writs of the debtors. In order to obtain decree for the sum contained in a prescribed bill, there are thus two things to be proved:—(1.) You are to prove the debt—that is, that it existed. This is called the constitution of the debt. (2.) You are to prove, that it is resting-owing. And every means of proving these is excluded excepting the oath or the writing of the debtor. Now, when the Statute came to be applied, considerable difficulty and great difference of opinion were found with respect to such debts as had been constituted solely by the bill or note—where, for instance, the acceptor had signed for the accommodation of another. Here, it was contended, the debt exists only by virtue of the bill, and, as by the statute the bill is annihilated, the debt necessarily ceases to exist also. To this it was answered, that the bill has, no doubt, ceased to exist as a document of debt, but it may be referred to in explanation of the question,—“Did you engage to pay the debt contained in this bill?” The undertaking to pay the debt is in itself an obligation irrespectively of the bill, and, if that obligation be proved by the party's oath, that is proof in terms of the Act independently of the bill, which is thus used only circumstantially, in order to get at the obligation, and not as in itself evidence of it. The latter view was sustained; and it is now to be held as settled, that, where a bill has been accepted for the drawer's accommodation, the holder may after prescription prove the debt by the acceptor's oath; *Laidlaw v. Hamilton*, 31st May 1826. 4 S. 636.

EFFECT OF THE
SEXENNIAL
PRESCRIPTION.

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EFFECT OF SEX-
ENNIAL PRE-
SCRIPTION,
contd.
11 S. 744.

Another principle established by a course of decisions is, that, when the debtor upon a reference to his oath admits the constitution of the debt, it is not sufficient that he declare himself ignorant whether it has been paid or not, and it will be held to be resting owing, unless the debtor depone to its extinction by payment or otherwise; *Christie v. Henderson*, 19th June 1833. This case was settled by the judgment of the whole Court, and this general principle in reference to such cases appears to be established by it, viz., that the lapse of six years does not annihilate the bill, but reverses the presumptions which previously subsisted with respect to its payment. Before the six years have expired, a bill in the hands of the creditor is presumed to be unpaid. After the six years, on the contrary, it is presumed to be paid, and the latter presumption can only be taken off by the debtor's writ or oath. But, in using that limited mode of proof, the bill itself may be referred to as an adminicle. When the constitution of the debt is admitted upon a reference to oath, it will not suffice to exonerate the party to depone generally that the debt has been paid, if, with respect to the circumstances of the payment, he does not satisfy the Court that he has adequate grounds to aver payment; *Paul v. Allison*, 10th March 1841; see *Stewart v. Robertson*, 13th November 1852. When the debtor is dead, and his representative upon a reference to his oath depones, that he is ignorant in regard to the constitution and subsistence of the debt, prescription will operate, because such a deposition affords no proof in terms of the statute; *Stirling v. Henderson*, 11th March 1817; *Houston v. Yuill*, 19th May 1825.

3 D. 874.

15 D. 12.

F. C.

4 S. 24.

PRESCRIPTION
OBTAINED BY
WRIT OF THE
DEBTOR.

With regard to the writing of a debtor which will suffice to take off the effect of prescription, there have been numerous questions, and, in some respects, much diversity of opinion; but the following rules appear now to be fixed:—

REQUISITES OF
DEBTOR'S WRIT.

It must be the writing of the party himself; the creditor's writing, unless in very special circumstances, will not suffice. Nor, as a general rule, will the writing of the debtor's factor suffice. But any writing of the debtor acknowledging the debt, or clearly implying its subsistence, as a marking by him of a partial payment, or of a payment of interest, is sufficient, provided such writing be *after* the expiration of the six years. These rules are all exemplified in the case of *Fergusson v. Bethune*, 7th March 1811. In *Lindsays v. Moffats*, 19th May 1797, the acceptor's writing, dated upon the last day of the six years, was held to prove the debt; but that is a special and extreme case. In *Wood v. Howden*, 7th February 1843, a letter from the creditor, acknowledging payment of interest after the years of prescription, having been preserved by the debtor in his repositories as evidence with respect to the debt, that was held to be writ of the debtor effectual to elide prescription. The admission

F. C.

M. 11,137.

5 D. 507.

must be clear by expression or necessary implication. It will not avail that there was a correspondence, if it contain no explicit admission of the debt; *Ewing v. Cumine*, 12th November 1835. But an offer by the debtor to pay a composition implies an admission of the debt; *Mackenzie v. Noble*, 15th February 1827. And, although, as a general rule, the writing must be the debtor's own, yet writing made by his direction or authority is, in some circumstances, held to be his own in the eye of the law, as in the case of an admission made by trustees through their factor; *Campbell v. Ballantyne*, 21st June 1839. The insertion of the debt by the acceptor in states of his affairs, prepared with reference to a trust conveyance for behoof of his creditors, was sustained as evidence *scripto*, sufficient to bar prescription, in *Watson v. Hunter & Co.*, 18th February 1841. When the debtor admits in writing the constitution of the debt, but alleges that it has been extinguished by compensation, that is sufficient to bar prescription, and the compensation must be proved; *Macdonald v. Crawford*, 7th March 1834. Although proof by the debtor's writing contemporaneous with the period of prescription is not admitted as evidence of the constitution of the debt, that rule does not apply to writing coeval with, or antecedent to, the date of the instrument. In the case of *Campbell v. Campbell's Trustees*, 19th May 1797, a docketed account of the same date as the bill was sustained as evidence of the debt, after the bill had prescribed; and, in *Sinclair v. Sinclair*, 19th December 1823, a debt constituted by a clause of warranty in a disposition of lands, and for which a bill was afterwards granted, was held not to be subject to the prescription of the bill. The principle of these decisions is, that, when the debt is founded upon a document separate from the bill, that document is to be looked to in determining its legal character, and as the debt, therefore, does not rest upon the bill alone, the presumption of payment established by statute does not take place, because the debt has a foundation not liable to that presumption.

In the earlier cases the effect of proof by the debtor's oath or writing was viewed as the rearing up of the bill for a second course of six years. But that view arose from an erroneous conception of the effect of the proof, which goes to establish not the bill but the debt. It is the debt which is exempted from participating in the effect of prescription upon the bill, and, as the debt, thus reconstituted, stands upon its own footing, it is not subject to the sexennial limitation, but to the ordinary prescription. This principle was clearly stated by Lord PITMILLY in *M'Indoe v. Frame*, 18th November 1824; and his Lordship there points out two important consequences resulting from the principle, viz (1.) If an action be raised, or diligence executed, against any one co-obligant before the lapse of six years, the bill will be sustained both against him and against all the others

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14 S. 1.

REQUISITES OF
DEBTOR'S WRIT,
contd.
5 S. 367.

1 D. 1061.

3 D. 583.

12 S. 533.

a M. 1648.

2 S. 600.

EFFECT OF PRE-
SCRIPTION BEING
OVIATED BY
WRIT OR OATH.

3 S. 295.

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M. 7532.

12 D. 1028.

2 S. 174.

for forty years ; and this was decided in *Gordon v. Bogle*, 23d June 1784. The same has again been held, to the effect of depriving the drawer of the benefit of the limitation, where it was alleged he was truly the ultimate debtor in a bill, upon which decree against the acceptor had been obtained within six years ; *Roy v. Campbell*, 14th June 1850. (2.) If the six years are permitted to elapse without action or diligence, then the writ or oath of each debtor can only affect himself, and will not subject any other co-obligant. This has also been decided in various cases ; see that of *M'Neil v. Blair*, 31st January 1823, and the authorities there cited.

M. 11,140.

As the execution upon bills and notes is a statutory privilege, it ceases to be competent after the expiration of six years, even against a party admitting his liability for the debt. It was so found in a case already referred to ; *Armstrong v. Johnstone*, 16th May 1804.

2 S. 174.

By the 40th section of the Act 1772, to which we have so repeatedly referred, it is declared, that the years of the minority of creditors in notes and bills shall not be computed in the six years. But the benefit of this provision is restricted to the case in which the minor is himself *nominatim* the creditor in the instrument, and it is not enough that the party beneficially interested was a minor, if the bill or note was payable not to himself but to his trustee ; *M'Neil v. Blair*, already cited.

Supra, p. 86.
9 Geo. IV.
c. 49, § 15.

5 Geo. III.
c. 184, § 13.

REQUISITES OF
A BANK DRAFT.

Bank Drafts.—We have already, in commenting upon the Stamp Acts, adverted to their requirements in regard to bank drafts. These, we have seen, in order to entitle them to exemption from stamp-duty, must be payable to the bearer on demand, and must be drawn upon a banker, or person acting as a banker, within fifteen miles of the place where the drafts are issued, which place must be specified in the draft. The draft must bear date on or before the day it is issued, and it must not direct payment to be made by bills or promissory notes. These requirements are enforced by very stringent penalties. For making and issuing a draft post-dated, or not truly specifying the place where it is issued, or which does not in every respect fall within the exemption, unless the same be stamped as a bill, the party issuing is to forfeit £100, the party receiving it in payment or security, £20, and the banker paying such draft in the knowledge that it is post-dated, or the place not truly specified, or in any other respect disconform to the terms of exemption, is to forfeit £100, and to have no claim against the party for the money paid. Orders for a sum less than twenty shillings are void in England by statute which does not extend to Scotland. It has been held, that orders by a party to debit his account with a certain sum, without mentioning the bearer or any payee, are drafts payable to the bearer, and entitled to the benefit of

the exemption; *Swan v. Bank of Scotland*, 8th December 1841. In the same case it was decided, that such orders did not lose the benefit of the exemption, although bearing at the bottom, apart from the signature and address, a memorandum in the drawer's writing, such as, "*per James Martin*;" but that such a memorandum, if inserted in the body as a continuous part of the order, must be held as making it payable only to the individual named, and, therefore, liable to duty as a bill.

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4 D. 210.

The bank draft is distinct from the draft or order, which, by 16 & 17 Vict. cap. 59, is liable to the one penny duty. The latter is an instrument entitling the person to whom it is sent to have credit with, or to draw or receive from, the party addressed. The instrument enjoying exemption is the draft or order upon a banker for payment of money to the bearer on demand.

By § 7 of 17 & 18 Vict. cap. 83, unstamped drafts, as we have already seen, may not be circulated beyond fifteen miles of the place where they are made payable, under a penalty; but, if such drafts have been lawfully issued, they may, by affixing a stamp, be made negotiable beyond the fifteen miles. *Supra*, p. 87.

Bank drafts are transferable by delivery and by indorsation, and the drawer cannot, in a question with the indorsee, plead compensation by a debt of the payee; *M'Gilchrist v. Arthur*, 17th January 1794. They are payable on demand, and, if the banker has funds of the drawer, or funds upon which the drawer is entitled to operate, as in the case of a cash-credit, then the banker is bound to pay immediately, allowing a reasonable time to himself or his clerks to ascertain the state of the party's account. But the draft must be presented at a reasonable hour, which, in the case of a bank, will be within the usual hours of business. The question does not appear to have occurred in Scotland, within what time the party receiving a draft must present it, in order to exempt himself from the risk of failure of the bank or other party drawn upon. The rule adopted in England is, that it be not later than the day following that on which he receives the draft, provided he has the means of doing so; and this rule would probably be adopted in Scotland, if the question should occur. A draft may be kept in circulation through successive indorsers, but the responsibility of the drawer, in event of the bank's failure, will not thereby be enlarged, and the responsibility of each successive transferee with regard to the presentment, will be the same as that of the payee to the drawer.

WHEN MUST
DRAFT BE PRE-
SENTED.

It is a question still undetermined, whether, in case of non-payment, a bank draft is capable of being protested, or of summary diligence. In the case of *M'Gilchrist*, last referred to, a protest was taken, and a charge of horning given, but the Court avoided the determination of this point by turning the charge into a libel and giving

WHETHER BANK
DRAFT CAPABLE
OF PROTEST OR
DILIGENCE.

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WHAT VIGILANCE INCUMBENT UPON BANKS IN PAYING DRAFTS.

decree. The prevailing opinion is, that a bank draft is not capable of protest or diligence ; but it may be sued on in an ordinary action against the drawer and indorsers, and also against the bank, if it possessed funds belonging to the drawer at the time of presentment.

If the sum in a bank cheque be dexterously altered to a larger amount, but without fault imputable to the drawer, the bank, although it pays the increased amount, will have no further claim against him than for the sum for which he truly drew.* The bank must, as a general rule, exercise ordinary vigilance, *diligentia media*, sufficient to detect frauds obvious to ordinary attention. In England, a party having written a draft and then torn it, and the pieces being found and pasted together by a stranger, the bank paid it, but the maker was found not liable.

A bank draft which has been paid is not evidence of payment to the creditor, although he be named in it, unless it bear his indorsation. This necessarily follows from its being payable to the bearer, who may not have obtained it from or through the creditor. It is prudent, therefore, when a draft may be useful as evidence, to make the creditor indorse it.

In England, a donation *mortis causa* cannot be constituted by a bank draft. We have already seen, that a donation so made, and paid by the bank after the granter's death, has been sustained in Scotland.

We have now examined the subject of bills of exchange and promissory notes as fully as our limits will permit. For more particular information, reference must be made to the treatises upon the subject, and especially to the careful and accurate work of Mr. Thomson. Enough has been said to develop the principles by which bills and notes are regulated in their form, negotiation, and enforcement. In descending to minute details, some degree of difficulty and occasional perplexity is unavoidable, but the grand principles are sufficiently obvious and easy of apprehension, and a reference to these will for the most part afford a clue to the solution of difficulties. We are to remember, that the system derives its origin from the common wants of men, and their common sense of the necessity of a simple and intelligible, but at the same time effectual, method of contracting between individuals of different nations. The first element is entire mutual confidence, which is secured by a common perception of its necessity, and the discredit which a breach of it entails. The next requisite was the simplest possible form of a perfect obligation. This is furnished by signature and acceptance—a plenary liability instan-

* It is the law both of England and Scotland, that payment upon a forged cheque is not any payment at all as between the party paying and the party whose name is forged ; *Orr & Barber v. Union Bank of Scotland*, 7th August 1854 (House of Lords.)

taneously following mere subscription, unqualified by any reservation not expressed. Then came the need of circulation, supplied by a mode of transference equally rapid and effectual—mere delivery in some cases, indorsation generally, the latter accumulating the security of a fresh obligation *in solidum* with every new name. The advantage of prompt enforcement is secured by the statutory provision, that every signature and indorsation implies a consent to a judicial decree for execution immediately on failure of payment. Then the preservation of the just rights of every party is provided for by protest and notice, which give the holder immediate recovery, and those liable to him, but not ultimately liable, instant means of securing their relief. The risk of fraud is averted by the rigid demand of integrity in the instrument; and the hazard of undue delay on the part of the creditor, by the statutory prescription. When we consider the magnitude of the transactions which take place in bills and notes every day, and the large amount of property constantly dependent upon the security which they afford, it is impossible not to admire a system which, by methods of such remarkable simplicity, accomplishes objects so important in their nature and vast in their extent.

In England, it has been a common practice to write across the face of a draft the name of a banker, the effect of this being to direct the drawees to pay the draft only to the banker whose name is written across. The object of this precaution is to invalidate the payment to a wrongful holder in case of loss. It has also been not unusual to write the words "*and Co.*" only, in the first instance, leaving the particular banker's name to be filled up afterwards, so as to ensure presentment by some banker or other. Now, the statute of 19 & 20 Vict. c. 25—upon the preamble, that doubts have arisen as to the obligations of bankers with respect to cross-written drafts, and that it would conduce to the ease of commerce, the security of property, and the prevention of crime, if drawers or holders of drafts on bankers, payable to bearer or order on demand, were enabled effectually to direct the payment of the same to be made only to or through some banker,—enacts, that "in every case when a draft on any banker, made payable to bearer or to order on demand, bears across its face an addition, in written or stamped letters, of the name of any banker, or of the words '*and Company,*' in full or abbreviated, either of such additions shall have the force of a direction to the banker upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker;"

§ 1. The word "bankers" includes those who act as bankers; § 2.

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CHAPTER VI.

DEEDS OF MUTUAL OBLIGATION BY TWO OR MORE PARTIES.

WE proceed to the examination of deeds of obligation to which there are more than one party.

THE INDENTURE.

ETYMOLOGY OF TERM.

I. THE INDENTURE.—The term “*indenture*,” as used in England, comprehends every deed which is executed by more than one party. Formerly, when deeds were more concise than they are now, the practice was to write the different parts or copies on the same sheet of parchment, and to separate the parts by a line cut like the edge of a saw—*instar dentium*. At one time certain words were written between the parts which were cut through by the indented line, in order the more certainly to identify the parts. These deeds, from being thus written together, were called by the Canonists *Syngrapha*, and in England *Chirographa*, the word *chirographum* being that interscribed and divided in separating the parts. A deed made by one party in England is not indented, but polled or shaved quite even, whence it is called a *deed-poll*. In Scotland no such practice exists as that from which the indenture has derived its name; and with us the term is limited to denote the written contract between a person who wishes to learn a trade or profession and a master exercising it.

PARTIES TO INDENTURE.

The indenture is thus a bilateral deed, the one party being the master and the other the apprentice. But, as apprentices are generally of imperfect age, and, therefore, incapable of effectually binding themselves, there is bound along with them in the deed a guardian or other party, as cautioner, undertaking that the apprentice shall implement the contract. An indenture executed by a minor without his father's consent is null; *Low v. Henry*, 14th November 1797. But, if it be entered into with the guardian's knowledge, and he does not interfere, it will be sustained. This was decided in a case in which the apprentice's brother was falsely represented to be his tutor, and subscribed as consenter and cautioner, the real guardian being cognisant of the transaction, though not a party; *Harvey v. M'Intyre*,

Hume, 422.

7 S. 561.

7th March 1829. In an ordinary contract of service it has been decided, that a party contracting with a company subscribing by the company firm remains bound, although all the partners but one retire; *Campbell v. Baird*, 13th February 1827; and the same principle would apply to an indenture. PART II.
CHAPTER VI.
5 S. 335.

The deed, after setting forth the parties, contains an obligation by the second party, binding himself apprentice to the master in his trade or profession, which is specified, for a certain number of years; and the apprentice binds himself to be faithful, honest, and obedient, not to reveal his master's secrets, not to conceal from the master anything injurious to his interests, and not to be absent without leave, under the penalty of two days' service for each day's absence. The cautioner becomes bound for the apprentice's obedience and diligence, and that he shall fulfil all the obligations incumbent on him, the apprentice granting him an obligation of relief. The master, on the other hand, binds himself, his heirs, executors, and successors, to instruct the apprentice in the trade or profession specified, in so far as he himself knows and practises it, and not to conceal any part of the business from him, but to cause him to learn the same, in so far as he is capable. Then both parties bind themselves to perform the contract to each other, under the penalty of a sum specified to be paid by the party failing to the other. Such is the general import of the indenture. Its provisions necessarily vary according to the particular profession, or the particular terms upon which the contract is entered into. TERMS OF IN-
DENTURE.

If there be an apprentice-fee, the full amount of it must be inserted and written in words at length, by 8 Anne, cap. 9, § 35; and, by § 39 of the same statute, indentures which do not contain the apprentice-fee, and are not duly stamped in terms of the Act, are declared to be void; and, if not stamped within the period required by §§ 37 and 38, they are incurably null. These enactments remain in force, although the duties are now regulated by 55 Geo. III. cap. 184, under the head APPRENTICESHIP in the schedule. The act of Anne has been strictly enforced. In *Horsburgh v. Hyslop*, 20th January 1727, an indenture was reduced, because a compliment of five guineas to the master's wife had been stipulated before, and paid after, the signing of the deed over and above the fee inserted therein; and, in *Macleod v. Sinclair*, 10th January 1738, the indenture was held void, in consequence of a fee of one guinea to the master's wife having been covenanted and paid, but not inserted, and the indenture was found not to be the ground of an action for recovering the apprentice-fee. Where a bill was given for the apprentice-fee and not inserted, the indenture was found null, and the bill not actionable; *Donaldson v. Fulton*, 14th February 1754. The insertion of the apprentice-fee is, therefore, indispensable; it is specified at the APPRENTICE
FEE, AND STAMP
DUTY.
8 ANNE, c. 9.
M. 58.
M. 585.
M. 587.

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beginning of the master's obligation, as one consideration of his part of the contract. If the master is to furnish board, or clothing, or tools, and if he is to pay wages to the apprentice, these particulars will be added at the end of the obligation to instruct.

EXECUTION OF
THE DEED.

M. 16848.

If the apprentice cannot write, he must execute the deed by two notaries and four witnesses; *Ferguson v. Macpherson*, 30th June 1758. In this case an indenture signed by one notary and three witnesses was held to give the master a claim for damages, upon the apprentice's desertion, only to the extent of £100 Scots. Notwithstanding of that judgment, it has been decided that an informal indenture may be made effectual by homologation; *Neil & Tait v. Vashon*, 31st January 1807, in which the cautioner's signature was by a mark only, the witnesses were not named or designed, and there was an erasure in the date. The apprentice, however, having served for a year, the contract was sustained by the Court as validated by homologation.

Hume, p. 20.

The apprentice must be free of any legal obligation to serve another person; and so, if he have already entered into indentures with another master, the second master cannot, in a question with the first, insist upon his services; *Macgregor v. Mitchell*, 31st May 1825.

4 S. 51.

DEATH OF AP-
PRENTICE.

The contract of indenture is necessarily personal merely as regards the apprentice, and is terminated by his death; but his representatives cannot upon that ground claim a return of any part of the apprentice-fee; *Shephard v. Innes*, 19th November 1760, the non-performance of the contract not arising from the master's fault. On the other hand, if the master shall die, or become bankrupt, or desert his business, during the period of apprenticeship, an abatement of the fee is claimable in proportion to the part of the period not elapsed;

M. 589.

DEATH OF
MASTER.

Ogilvy v. Hume, February 1683. But, as the obligation on the master's part is not merely upon himself, but his heirs, executors, and successors are also bound, no part of the fee is returnable upon the master's death, if his representatives make adequate provision for instructing the apprentice by one properly qualified; *Cutler v. Littleton*, 17th February 1711. When the obligations do not extend to the master's representatives, the apprentice is not bound after his master's death to serve his executors; *Neil*, 15th July 1760.

2 Br. Supp. 34.

M. 583.

BREACH OF
INDENTURE.Elchies, voce
"Apprentice,"
No. 3.

The marriage of the apprentice during his apprenticeship does not make void the indenture, or incur the penalty or damages, if he be willing still to serve; *Fenton v. Finlay*, 10th June 1742. With regard to the acts in the personal conduct of either party which amount to a breach of the contract, and subject the master in the loss of his apprentice's services, or the apprentice and his cautioner in the loss of instruction as well as penalty and damages, it is to be remarked generally, that the law makes allowance for human infirmity, and the contract cannot be annulled on account of angry words resulting from

temporary irritation, or of the venial faults of youth and thoughtlessness. Thus, the passionate language of his master does not justify an apprentice in quitting his service and afterwards demanding wages; *Stirling, Gordon, & Co. v. Calderhead's Executors*, 6th December 1832. 11 S. 180. On the other hand, in the case of *Lessils v. Ranken*, 13th February 1680, it was held not a sufficient ground for a master to thrust his apprentice out of his service, that he, after many admonitions, still lay long in bed, and refused to carry his master's bible to church, or was once drunk, but he was allowed only moderately to chastise him for these or the like faults. And, where an apprentice had run away, it was held sufficient to exempt the cautioner from the penalty, that he offered to bring him back within a few days; *Malvenius v. Hepburn*, 17th December 1686; and to the same effect is *Learmonth v. Blackie*, 13th February 1828. But mental disease in the apprentice, such as to render him incapable and unserviceable, is a sufficient ground of dismissal; *Lessils*, already referred to. An apprentice having been guilty of theft, the master was held not bound to take him back, and entitled to recover the stipulated penalty of one shilling for each day's loss of service, without deduction for the expense of board avoided by the breach of indenture; *Maxwell v. Buchanan*, 8th March 1776. 3 Br. Supp. 337. M. 583. 6 S. 533. 3 Br. Supp. 337. M. voce "Apprentice," 4 Appx. No. I.

The positive damage which the master may sustain is not limited to the penalty, the apprentice, as well as the cautioner, being bound for the performance of his obligations; and so a cautioner was subjected in damages for embezzlement by the apprentice; *Forbes v. Dickson*, 2d July 1708. But, if the penalty exceeds the actual damage, it is subject to an equitable restriction; *Sibbald v. Fletcher*, 21st June 1758; and *Wright v. M'Gregor*, 9th February 1826. In *Watson v. Merrilees*, 18th January 1848, the Court refused to remit to a jury to ascertain the damage occasioned by desertion of an apprentice, and themselves modified the penalty. PENALTY IN INDENTURES. 4 Br. Supp. 708. M. 588. 4 S. 434. 10 D. 370.

The cautioner's obligation, as well as that of the apprentice, is held to be discharged by the master's acquiescence or non-interference, if the apprentice leave his service and take other employment under his eye during a course of years; *Robinson v. Smith & Co.*, 19th June 1800. Hume, 20.

The master's right to the apprentice's services is subject to certain restrictions on the ground of public policy, in order that the State may not be unduly deprived of such of the lieges as are qualified for the public service. By the Mutiny Act, 19 Vict. cap. 10, § 62, no master is entitled to claim an apprentice who shall enlist in the service of Her Majesty, or of the East India Company, or shall be serving in the embodied militia, unless, within a month after the apprentice has left his service, he go before a Justice of the Peace, and emit an oath in the terms prescribed by the Act. In Scotland, the apprentice must have been bound for at least four years (unless the indenture MASTER'S RIGHTS YIELD TO PUBLIC POLICY.

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be for the sea-service, where no particular term is required) by formal indenture, binding on both parties, executed before the enlistment, which indenture must, within three months from the commencement of the apprenticeship, and before the enlistment, have been produced to, and indorsed by, a Justice of the Peace. This power of reclaiming is available only if the apprentice when claimed be under twenty-one years of age. To encourage masters to part with their apprentices for the public service, they are entitled, upon giving up the indentures within a month after the enlisting, to receive for their own use so much of the bounty as shall not have been paid to the recruit. As regards the navy, the master's power of reclaiming an apprentice who has been impressed, or has voluntarily entered the service, is entirely excluded, if the apprentice had been previously bred to the sea; *Cunningham and Simpson v. Home*, 19th January 1796,—an example both of an apprentice not bred to the sea successfully reclaimed, and of the claim disallowed with regard to another who had been bred to the sea. When a master reclaims an apprentice from the sea service, he is not bound to find caution to restore him at the expiration of the indenture, as is the case when persons are taken out of the public service by process for debt or delinquency; *Smith*, 23d June 1814. But, although an apprentice previously bred to the sea service cannot be reclaimed, the apprentice-fee is wholly exigible if he enter the service voluntarily; *Arbuthnot v. Gentleman*, 19th January 1694. An apprentice's obligation under his indenture does not exempt him from the performance of statute labour upon the high roads, where specific implement of that obligation is required; *Mackay & Co. v. Justices of Peace for Ross-shire*, 27th November 1807.

M. 600.

F. C.

4 Br. Supp. 127.

M. voce "Apprentice,"
App^r. No. 2.

CONSTRUCTION
OF OBLIGATIONS
IN INDENTURE.

The obligations of the apprentice and of the master respectively, are sufficiently defined by the terms of the indenture, and any questions which occur with regard to the proper implement of these obligations, will be determined by a fair construction of their nature and import, neither party being obliged to do work which does not fairly fall within the terms of the obligation, and each being obliged to do whatever may be necessary for the fair and honest performance of his part of the contract. The contract is also subject to statutory control, and may not be made the means of enforcing acts which by statute are forbidden. Any decisions which have occurred have been in consistency with these general principles. Thus, as regards the obligation of the apprentice, he is not bound to do work different from the business specified in the indenture, and, therefore, is not subject to dismissal, nor is the penalty or damages incurred by his refusal to execute other work; *Symintoun v. Brocks*, 14th January 1673; *Peter v. Terrol*, 26th September 1818. But he may be required to teach a younger apprentice in the trade which he is himself learning; *Bal-lantyne & Co. v. Kerr*, 21st November 1811.

2 Br. Supp. 166.

2 Murray, 28.

F. C.

We have already had occasion to refer to the case of *Innes v. Phillips*, 19th May 1835, reversed 20th February 1837, in which it was ultimately decided, that an apprentice cannot be compelled to work upon Sunday. As regards the master's obligations again, he must comply with every legal requirement necessary to enable him to exercise the trade or business which he has undertaken to teach, and, therefore, a master-currier having ceased to take out the license enjoined by statute to qualify him for exercising that trade, he was found not entitled to enforce the penalty, and the apprentice was held to be free of the indenture; *Watson v. Grindlay*, 16th November 1826. Nor may the master change his employment during the currency of the indenture; *Chiesly v. Cuthbert*, 5th December 1665. 5 S. 3. Here a charge for an apprentice fee was suspended, the apprentice having been bound to the master as an apothecary, and the latter having given up that employment and become a druggist. But, although the master is bound to teach his apprentice, that obligation is not so strictly interpreted as to entitle the apprentice to desert, if the master do not give constant personal attendance; and it was held a sufficient implement of the obligation, that, although the master gave little personal attendance, yet the work in the shop was daily carried on by experienced journeymen, and the apprentice had it thus in his power to receive constant instruction; *Gardner v. Smith*, 13th July 1775.

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13 S. 778.
2 Sh. & M'L.
App. 465.
CONSTRUCTION
OF MASTER'S
OBLIGATIONS.

Under this head we have only further to refer to the following statutes:—(1.) 3 & 4 Will. IV. cap. 103, an Act passed in order to regulate the labour of children and young persons in mills and factories. By this Act, the age at which children may be employed, the number of hours they may be required to work, the time allowed for meals and education, are regulated, and various rules enacted conducive to their temporal and moral welfare; and inspectors are appointed with powers to secure the observance of the Act. (2.) The Act 7 & 8 Vict. cap. 15, amending the former statute. (3.) The Act 8 & 9 Vict. cap. 29, regulating labour in print-works. (4.) 9 & 10 Vict. cap. 40, declaring rope-works not within the operation of the Factory Acts. (5.) 10 & 11 Vict. cap. 29, limiting the hours of labour of young persons and females in factories. (6.) 13 & 14 Vict. cap. 54, amending the Acts relating to labour in factories. (7.) 16 & 17 Vict. cap. 114, further regulating the employment of children in factories. (8.) 19 & 20 Vict. cap. 38, passed for the further amendment of the laws relating to labour in factories.

II. CONTRACT OF SUBMISSION.—*Submission*, which is also called *Arbitration* or *Reference*, is a contract, whereby two or more persons having a disagreement, appoint one or more arbiters or private Judges,

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NATURE AND
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CONTRACT OF
SUBMISSION.

to decide the dispute, and bind themselves to be regulated by the decision. This is a mode of settling differences which naturally recommends itself to lovers of peace. It was early enjoined in very pointed terms upon the converts to Christianity ; and, although with us there is no longer the same reason for avoiding the public tribunals of justice, yet there is happily prevalent a sentiment of Christian propriety and decorum, which leads those influenced by it to settle their differences by amicable arbitration, rather than by litigation ; and the Legislature, as well as the Courts, have always been disposed to give countenance and sanction to such extra-judicial arrangements. In England, the adjustment of disputes by submission is the subject of express statutory regulation, the Act 9 & 10 Will. III. cap. 15, (1698,) having been passed "for determining differences by arbitration." This statute is founded on the preamble, that "references made by rule of Court have contributed much to the ease of the subject in the determining of controversies ;" and it authorizes parties who desire to end any controversy or quarrel, whether it be the subject of a suit or not, to make their arbitration a rule of Court, which has the effect of giving to the award the same efficacy in execution as a judgment of Court, unless, in the words of the Act, the arbiters misbehave themselves, or their award be procured by corruption or other undue means. Blackstone eulogizes the great use of "these peaceable and domestic tribunals, especially in settling matters of account and other mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law." Later writers in England have not viewed the practice of arbitration with the same favour, and it appears that the investigation of awards in arbitrations has occupied much of the time of the English Courts. But this probably arises from the circumstance, that an arbiter's decision in England is more exposed than with us to exception of party, which opens it largely to judicial scrutiny ; and thus the system of arbitration there leads to much subsequent litigation and expense, of which in Scotland we have happily little or no experience. The expediency of a settlement by submission is always a question of circumstances. When the sole object is to obtain a decision upon a question of pure law, it is to be presumed, that the best determination of such a case will be received from the Bench ; and here the preference of a submission will depend upon other considerations, as perhaps of economy, or of circumstances in the relations of the parties, which make an extra-judicial settlement desirable ; and the same view will be taken in questions dependent partly upon law, and partly upon the result of an investigation of facts. When the dispute, however, is mainly dependent upon questions of science or of practical knowledge, with regard to which the Court cannot decide without receiving the aid of a man of skill, as the decision here depends ultimately upon the opi-

nion of the referee appointed by the Court, it may frequently be the most eligible course to select him at once as the Judge. In all cases of reference the parties ought to be of well constituted and well regulated minds, such as will receive the arbiter's decision with the same acquiescence as a judicial sentence. A material point also is the obtaining the services of a well qualified arbiter—one skilful in the matter submitted, and of such position as to give weight to his decision. It is desirable that he be unconnected by neighbourhood, friendship, or otherwise, with the parties; and no one can properly discharge an arbitrator's duties, who has not intelligence and independence to exercise and apply a judging mind to the matter submitted, and to decide upon principle without yielding to the natural but censurable desire to satisfy both parties by making them share equally a benefit or loss, without much regard to the question of right. In all cases it must be borne in mind, that a submission is more exposed than a suit in Court to the hazard of delay, the facilities of despatch being less, and the proceedings, from their amicable nature, less capable of being urged forwards. There is also this risk peculiar to a submission, viz., that it may not result in a decision of the question submitted. If the matter be difficult, or if the right decision involve consequences of extreme hardship or disaster to one of the parties, and, if such obstacles as these concur with a strong sympathy or natural indolence in the arbiter, the result may be, that he will avoid pronouncing his award, while it is doubtful whether he can be compelled to proceed, and the question being tied up by the submission, the parties are debarred from resorting to any other tribunal. These views shew very strongly how advisable it is, in selecting arbiters, to obtain the services of men of strong minds and high principles, and sufficiently removed from exposure to feelings of interest or sympathy in the matter referred.

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NATURE AND
EXPEDIENCY OF
SUBMISSION,
contd.

But to proceed to the mode of constituting a submission in Scotland—we observe, in the first place, that, excepting perhaps in cases where the interest is of very trifling value, a submission cannot be effectually made by spoken words. Formerly, arbitration by parole was competent, and the Court, in the case of *Home v. Scot*, 7th February 1671, allowed it to be proved by the charger's oath that he did submit, and by the arbiters' oaths that they did determine. But, by the "Articles of Regulation concerning the Session," prepared by a Commission of Parliament in 1695, the protection given to decrees-arbitral (which will afterwards be more particularly referred to) is limited to such as are pronounced upon "*a subscribed submission*," and from that time writing has been held essential. It was so found in *Fraser v. Williamson*, 24th June 1773; and, in *Ferrie v. Mitchell, &c.*, 5th June 1824, a debt being claimed as having arisen under s 3. 113.

CONSTITUTION
OF CONTRACT OF
SUBMISSION.

M. 8402.

M. 8476.

PART II. a submission, it was held incompetent to prove the submission by the
 CHAPTER VI. oath of party, and the decree-arbitral by the oath of the arbiter, and
 it was observed on the Bench, that the case of *Home* had occurred
 prior to the Regulations of 1695.

COMPETENCY OF PARTIES TO SUBMIT. With regard to the competency of parties to a submission, reference
 will be made to the result of our inquiries into the capacity of parties
 to grant deeds generally, and the following points may further be
 noted :—

MINORS. In order to secure a submission by guardians from challenge by
 the pupil or minor, it will be prudent to require the guardians to be-
 come personally bound, that the decree-arbitral shall be fulfilled. In
 this way the party contracting with them will be secured by their
 individual obligation from the risk of any eventual question on the
 ground of minority. It must be kept in view, however, in such a
 case, that the guardians, being bound as individuals, acquire a per-
 sonal interest, and so become principal parties to the submission, and,
 as a submission falls by the death of one of the parties to it, the death
 of one of a body of tutors will evacuate a submission to which they have
 become parties as taking burden upon them for their pupils ; *Mait-*
 M. 641. *land v. Mitchell and Arnot's Representatives*, 18th May 1796. This
 case also settles, that, when the pupil is a female, a submission under-
 taken by tutors on her behalf falls by her marriage, unless the husband
 choose to become a party to it. A married woman cannot be a party
 to a submission, because she is incapable of binding herself to imple-
 ment the decree ; but, in regard to any separate estate of which she
 is possessed, she may with her husband's consent make an effectual
 submission, the engagement to fulfil being secured not by her per-
 son, but by her separate property. A *curator bonis* appears to have
 an inherent power to enter into submissions ; *Corson*, 10th July 1835 ;
 so also a *factor loco tutoris* ; *Falconer v. Thomson*, 17th February
 1792. When several parties are bound upon one side jointly and
 severally, the obligation is of course regulated by the same principles
 which we have found determining the effect of joint and several obli-
 gations in bonds, and each of such parties will, therefore, be liable
in solidum. Where one of the parties is a company, it will be prudent
 to require the subscription of every partner, as well as of the firm, in
 order to obviate the objection, that, submission being an extraordinary
 act, no partner who does not subscribe is bound ; *Lumsden v. Gordon*,
 November 1728. References are frequently entered into by agents
 on behalf of their clients, and it is necessary for their own security
 that the step be undoubtedly authorized by the client. In *Living-*
 stone v. Johnson, 23d February 1830, an agent, having bound his con-
 stituent to abide by an arbiter's award, was subjected personally in
 expenses and implement of the award, upon failing to prove that the
 submission had been authorized by the client. If the client had

MARRIED WO-
 MEN.

CURATOR BONIS.

13 S. 1093.

M. 16380.

COMPANY.

M. 14,567.

AGENTS.

8 S. 534.

homologated the submission, there would have been no ground for subjecting the agent personally. But, when a party subscribes a submission on behalf of another, not simply binding the principal, but binding himself as taking burden for the principal that the decree shall be implemented, that is not an undertaking merely binding the principal to perform, but an obligation on the subscribing submitter personally that performance shall be made; *Woodside v. Cuthbertson*, 10 D. 604. 4th February 1848. A submission, entered into by a factor with his constituent's tenants, but which does not name the constituent, cannot form the foundation for diligence against the constituent; *Muirhead v. Stevenson*, 19th February 1848. 10 D. 748.

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The party to a submission may, during its dependence, competently assign his claim under it, so as to substitute in his place the assignee, who may thereupon obtain the decree-arbitral in his own name; *Henry v. Hepburn*, 29th January 1835. But this doctrine must be taken with the qualification, that the opposite party shall not suffer by the assignation, as would be the case, if one should attempt to substitute a party possessing no means, in order to avoid responsibilities under the contract. In such an assignation, therefore, the granter of it must necessarily remain bound for implement of his obligations under the submission. 13 S. 361.

PARTIES TO
SUBMISSION MAY
ASSIGN.

The next point is the subject-matter of the submission. It may be either of all matter in dispute between the parties, which is called a GENERAL submission, or it may be of a particular question, or of all questions regarding a particular matter, and then it is called a SPECIAL submission. Submissions are favourably viewed by the law, and the inclination of the Court is to give them an extended construction, so as to comprehend all questions which may fairly be held to fall within their terms. And so, when the terms of a submission are general, it has been held to include questions regarding heritable rights as well as moveable. The practitioner should study, however, to state the matter submitted in terms so distinct and explicit as to prevent doubt. In order to determine the extent of a submission, it was held competent in the case of *Steele v. Steele*, 22d June 1809, to refer to a previous litigation between the parties; and, in *Renton v. North British Railway Co.*, 9th June 1847, a submission was read along with a previous agreement, in order to ascertain its extent. In *Pitcairn v. Drummond*, 24th May 1822, an ineffectual attempt was made to limit the application of a general submission, and an award for meliorations in favour of a tenant, though his lease contained no stipulation as to meliorations, was sustained on the ground of the general terms of the submission. This decision was affirmed on appeal, 20th May 1825. It is of primary importance that the matter submitted be expressed in clear and unambiguous terms, not capable of doubt or misconstruction. In *Aberdeen Railway Company v. Blaikie*, 28th 13 D. 527.

SUBJECT-MAT-
TER OF A SUB-
MISSION.
—
SUBMISSION
GENERAL AND
SPECIAL.

9 D. 1209.
1 S. 431.
1 Wil. & Sh.
App. 194.

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January 1851, the matter submitted was left doubtful by the terms of the deed of arbitration ; and Lord FULLERTON complains, that the deed is ambiguous and defective, the common rules of grammar, and ordinary sequence and connexion of language being disregarded. No practitioner will willingly put out of his hands an instrument liable to such strictures.

SUBMISSION
MUST BE CON-
DUCTED *optima*
fide.

It is a settled rule, that the matter in dispute must really and truly be left to the judgment of the arbiter. An arbitration will receive effect from a Court of Law, only when it is conducted in perfect *bona fides*, and it will not, therefore, be supported if resorted to merely to serve as a cloak to an adjustment by compromise or otherwise, which has been determined already by the parties themselves, the arbiters being merely called in to give the authority of the form of a decree-arbitral to the settlement thus previously arranged. In the case of *Maule v. Maule*, 9th April 1816, a submission was entered into, one of the parties taking burden upon him for his son who was a minor, and who upon attaining majority performed various acts in obedience to the decree-arbitral, believing the submission and award to have been *bona fide* proceedings of the nature which they professed. Afterwards, however, the original scroll of the submission was discovered, and letters of one of the arbiters, from which it appeared, that the arbitration had been gone into merely as a mode of giving effect to a previous agreement of the parties, and that the arbiters had not in reality received the parties' claims, or heard them as arbiters, but had merely pronounced an award in the terms previously settled. The House of Lords, reversing the decision of the Court of Session, found that these proceedings ought not to be considered as having in law the effect of a submission or decree-arbitral. In deciding this case, Lord ELDON remarks, " that arbiters ought to go into the room " as Judges, and that, though one is chosen by one party and another " by another, each is not to act merely for the interest of the party " by whom he is named. Arbiters, by whomsoever named, ought to " be perfectly indifferent between the parties, and owe to the parti- " cular parties duties of the same nature as those which the King's " Judges owe to His Majesty's subjects in general, though not named " by them."

EFFECT OF EN-
TERING INTO
SUBMISSION.

The effect of entering into a submission, and of its acceptance by the arbiter named, is to bind the parties to this particular mode of settling their disputes, and, consequently, to exclude them from other means of trying it. It is, therefore, incompetent for a party to a submission accepted by the arbiter to institute an action against the other party regarding any matter which falls within the terms of the submission ; *Robertson v. Johnston*, 22d January 1835. As action is thus excluded, so is diligence, and, therefore, it was held incompetent to give a charge for the price of a subject, pending disputes regarding

4 Dow's App.
363.

13 S. 289.

the terms of the conveyance, which disputes by the articles of roup under which the purchase was made were submitted to arbitration; *Stewart v. Lang's Trustees*, 30th November 1839. Nor can a party escape from the mode of settlement to which he has bound himself, by judicially challenging the integrity of the arbiter. In *Drew v. Leburn*, 8th June 1850, the Court refused to suspend the proceedings in a submission during the dependence of an action to have it declared, that the arbiter had disqualified himself from further proceedings by corruption and partiality. The principal action was afterwards dismissed as irrelevant; *Drew v. Leburn*, 28th February 1852; and the Court expressed strongly their reluctance to interfere during the dependence of a submission, unless the pursuer of such an action of declarator averred specifically something inferring corruption, extraneous to the arbiter's mere actings in the conduct of the submission, it being not enough to say that he has gone wrong in his actings, as errors in the proceedings may be corrected before decree.*

As the contract of submission implies, that each party to it places his legal rights at the disposal of another, the qualities of the referee form evidently a consideration of the first importance to the party who invests him with such a power; and it is, therefore, an essential principle of the law of arbitration, that the arbiter must be an individual selected or assented to by the party. The rule of *delectus personarum* is not stronger anywhere than it is here, and it receives an effect so stringent, that an obligation to submit, however clear, has no compulsory effect, unless an arbiter or arbiters be named. It cannot even be used as the means of forcing the granter of it to select a referee. A general obligation to settle disputes by reference, therefore, but without appointing a referee, is legally inoperative; *Davidson v. F. C. Oswald*, 28th February 1810. This is a well established rule, which it is of importance for practitioners not to lose sight of. Like every other rule, it bends, of course, to positive statute, and, where arbitration is prescribed by Act of Parliament, as in the case of Friendly Societies under the Act 33 Geo. III. cap. 54, § 16, the objection of

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2 D. 167.

12 D. 983.

14 D. 559.

ARBITER MUST
BE NAMED.

* This decision was affirmed on appeal, 8th March 1855. Lord BROUGHAM observed:— 2 Macq. App. 1.
“ I do not contend, that there may not be cases in which it would be justifiable in the Court to stop what is called a going submission, and to interfere upon an application, unfortunately not as our more convenient course sanctions by summary application,” (see 3 & 4 Will. IV. c. 42,) “ but by an action of declarator and interdict, as in the present case. I do not take upon myself to say, that I may not imagine cases which would justify the Court, in respect of the incurable nature of a flaw in the proceedings suggested by such a suit, sanctioning the suit and stopping a going submission. Such cases may arise; I can imagine one very easily of gross corruption on the part of the arbiter. If one party chooses to insist upon going on, and the other party says—What is the use of going on now, when the result can only be that the award or decree of the arbiter must be set aside?—I can well imagine that the Court of Session would be justified in sustaining the reasons of a declarator and interdict, and stopping a going submission. But nothing of the sort occurs in the present case.”

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8 S. 648.

2 D. 1015.

ARBITER MUST
BE NAMED.

2 S. 593.

8 S. 970.

5 D. 749.

delectus personarum will not be admitted to exclude that mode of settlement; *Cooper v. Bertram, Shotts Friendly Society*, 11th March 1825; *Manson v. Doull*, 5th June 1840. Another exception has gradually been gaining ground, viz., where the reference is not strictly a submission of existing or anticipated disputes, but is of the nature of an agreement for completing and explicating a contract, into which the parties have entered. Thus, an agreement in a lease to transfer farm stock at a valuation by referees, effectually fixes that as the mode of ascertainment, though the referees be not named; *Munro v. Mackenzie*, 18th December 1823. An agreement in a lease of coal, that it should be void after nominees mutually chosen should report that the coal could be no longer worked to advantage, was held obligatory upon the parties to choose men of skill; *Dixon v. Campbell*, 25th June 1830. And an agreement in a lease, that the value of land to be retained by the proprietor should be fixed by men mutually chosen was held to exclude an action to ascertain the damage, and the parties were held bound to concur in naming referees; *Smith v. Duff*, 28th February 1843. In the report of this case, the leading authorities will be found cited. But, while there is thus a limited exception, and, while a reference to arbiters not named will receive effect when designed to explicate certain agreements, still the general rule remains unshaken, that a reference without arbiters specified is inoperative with regard to disputes existing or anticipated. Even with regard to such disputes, the general obligation to submit is of frequent occurrence in contracts, leases, and other deeds connected with matters in which differences of opinion are likely to occur; and these form a class of cases peculiarly adapted to this mode of settlement. But, although this general obligation is not legally binding, the clause practically receives effect, and it has been approved of by Conveyancers as having a pacific tendency. Our Courts also will give encouragement to parties to resort to this conventional means of adjusting matters not properly suited to judicial investigation; and, although they cannot, excepting in the limited class of cases already specified, refuse to entertain an action on the ground that there is a general obligation to refer, while no arbiter is named, they will not regard favourably litigations resorted to without any attempt to settle the dispute in the spirit of that obligation, and they will generally adopt a mode of settlement essentially the same in its result by a remit to a skilled referee, where that is obviously the most eligible course of procedure. The arbiter must not only be agreed upon, but he must be specified by his proper individual name, so as to make it clear that the parties have agreed upon this particular person. A submission, therefore, to the holder of an office, as the Dean of the Faculty of Advocates, the Solicitor-General, or the Deputy Keeper of the Signet, without naming the individual holder, is ineffectual;

Buchanan v. Muirhead, 25th June 1799. In *Hendry's Trustees v. Renton & Co.*, 28th May 1851, a submission to A. & B., whom failing to any person to be named by the Sheriff of Lanarkshire, was held ineffectual after the death of A. & B. There is here a full note of authorities, and the Judges' opinions refer to the distinction between a reference generally, and a reference of matters necessary to the extrication and effect of a contract. The nomination of arbiters must be the mutual act of the parties. If one arbiter is appointed, he must be the choice of both. They may agree that each shall name one; and, in that case, if the nomination of either party does not fairly receive effect, that will be fatal to the proceedings; *Deas v. Aytoun*, 25th May 1821. Here execution was refused to a decree-arbitral, in consequence of one of the parties having inserted in the submission, along with the referee selected by himself, a different person from the one chosen by the other party.

It is no objection to an arbiter, that he has an interest in the matter submitted to him, if that circumstance be known to the parties when they submit; *Johnston v. Cheape*, 8th July 1817. But, if an interest to the arbiter shall emerge after his nomination, that circumstance will disqualify him; *M'Kenzie v. Clark*, 19th December 1828; *Tennent v. Macdonald*, 16th June 1836. It is no disqualification of an arbiter, either in continuing or accepting of a submission, that he is a Judge of the Court of Session; *Fisher v. Colquhoun*, 16th July 1844. In the old case of *Gordon v. Earl of Erroll*, June 1582, it was decided, that a minor may be an arbiter. A contractor with a railway company having agreed to refer all disputes to A. B., the Co.'s engineer, and A. B. having subsequently been appointed manager of the company, that circumstance was held not to disqualify him; *Phipps v. Edinburgh & Glasgow Railway Co.*, 11th March 1843.

When there are two arbiters, it is advisable to obviate the risk of a difference of opinion, which, unless provided against, may render the proceedings fruitless; and this may be done, either by empowering the arbiters to nominate an additional arbiter, or by the appointment of an oversman or umpire. If an additional arbiter be appointed, he will act and decide along with those originally named. An oversman does not act, unless and until the arbiters differ in opinion. The oversman may either be appointed along with the arbiters by the parties in the deed of submission, or they may by the deed give power to the arbiters to name him. If the appointment is left to the arbiters, they may nominate him at any time within the period during which their powers under the submission last. Lord ELLENBOROUGH remarks:—"It is very convenient for arbitrators to begin by appointing an umpire, because they are more likely to agree upon a proper choice of one before they themselves begin to quarrel;" but that

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M. 14593.
13 D. 1001.

DISQUALIFICATION OF ARBITERS.

5 Dow's App. 247.

7 S. 215.
14 S. 976.

6 D. 1286.
M. 8915.

5 D. 1025.

OVERSMAN.

2 Jarm. & Byth. Conveyancing, 665.

- PART II.
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OVERSMAN,
CONT^d.
- 2 S. 382. "there is nothing to restrain them in reason and sense from choosing
"the umpire at any time while he has power to act." In Scotland,
it is well ascertained, that the arbiters may effectually appoint an
oversman before they themselves proceed to consider or decide the
case. But, if they do so, the nomination is contingent upon their dif-
fering in opinion. If no difference arises, the oversman never acts ;
and if a difference does occur, it is only then that the submission de-
volves upon him ; *Brysson v. Mitchell*, 10th June 1823. A decree-
arbitral by an oversman, therefore, is invalid, unless it appear dis-
tinctly, that he acts in consequence of the arbiter having differed in
opinion ; *Gordon v. Abernethy*, 30th November 1716 ; *Gardner v.*
M. 655. *Ewing*, 19th January 1773. It has been decided, that refusal by one
M. 659. of two arbiters to act, is a sufficient ground for the oversman to pro-
ceed ; *Middleton v. Chalmers*, 9th June 1721. In this case, the fact
Robertson's of the refusal to act was certified by notarial protest. The act by
App. 391. which the arbiters appoint an oversman is called a devolution. It
was formerly held, that the devolution must be executed with legal
solemnities, but the later decisions do not require that formality ;
F. C. *Kirkcaldy v. Dalgairns' Trustees*, 16th June 1809. An oversman
cannot effectually decide, where there is no original nomination or
2 S. 167. devolution appointing him ; *Telfer & Co. v. Bell*, 31st January 1823 ;
and a devolution, executed by arbiters upon whom the parties have
conferred no power to appoint an oversman, is inept ; *Matheson v.*
4 D. 1472. *M'Kenzie*, 1st July 1842. But it has been decided, that one of two
arbiters cannot be compelled either to pronounce an award or to
choose an umpire, because it may be impossible for him to agree with
the other, either in the decision or in the selection ; *White v. Fergus*,
M. 633. 7th July 1796. In selecting an oversman, the arbiters must exercise
their judgment, and expedients for making the selection which might
be available to the parties are not permitted to them. Thus, in Eng-
land, a nomination was held void, which was made by tossing up
2 Jar. & Byth. which of the arbiters should name the umpire. But, in another case,
Conveyancing, the appointment was sustained, two persons having first been named,
670. both of whom were admitted by each arbiter to be fit, and then they
Ibid. 671. tossed which of these should be the umpire. Here there was an in-
telligent selection of two fit persons, and the decision, therefore, falls
within the principle of the rule thus stated by Lord TENTERDEN :—
"The appointment of the third person must be the act of the will
"and judgment of the two—must be matter of choice and not of
"chance, unless the parties consent to, or acquiesce in, some other
"mode."

Endurance of submission.—By the usual style of submission, the
parties bind themselves to fulfil whatever the arbiters or oversman
shall determine by decree-arbitral "to be pronounced betwixt and the
" day of next to come." When the termina-

tion of the period is thus left blank, it is held that the submission expires in a year, or, as now ascertained, a year and day. This was settled by the old case of *Wallace v. Wallace*, 23d February 1672; and the same construction has been applied, where there was merely a blank without the words "*next to come*," although it was contended that the limitation to a year was founded entirely upon these words; *Stark v. Thom*, 23d December 1820. When the period for pronouncing an award is not limited either by specifying a distinct date, or by a blank, which imports a limitation to a year and day, it has been a point of much discussion and uncertainty how long a submission endures. In one class of cases, viz., those in which it is evident that the submission is designed to provide for the determination of questions which may not or cannot arise or be ready for decision, until years have elapsed after the execution of the submission, it would defeat the parties' object to hold the submission inoperative after the lapse of a year; and, in the case of *Brysson*, already referred to, where the submission formed part of a contract for erecting buildings, and was entered into for the purpose of settling claims that might arise in the course of the work, until the matter was finally wound up, it was held that the submission did not expire by the lapse of a year, and that an award pronounced afterwards was valid; and the same was found with regard to a submission, forming part of an agreement as to a lease of coal; *Halket v. Earl of Elgin*, 16th December 1826. Even when there is no such specialty, from which the intention to submit during a period of years can be inferred, it was the opinion of Mr. Erskine, that a submission not limiting the arbiters to any determinate time, ought, like other contracts or obligations, to subsist for forty years. This question was deliberately considered, and the opinions of the whole Court taken in the case of *Fleming v. Wilson & Mc'Leilan*, 7th July 1827, when a judgment was pronounced in accordance with Mr. Erskine's opinion, but with considerable difference upon the Bench, six of the Judges being of opinion, that a submission, although not limiting the time, does expire at the end of a year.

A submission is brought to an end, not only by the expiration of the period fixed by itself, but also immediately upon the death of either party. This results from the very peculiar nature of the contract. The selection of the Judge is a *delectus personæ* with a reference to the individual antagonist party with whom the submission is contracted; and either party may upon his death be succeeded by a representative, with whom such a contract would not have been entered into at first. This is a well-established principle, and it received effect in the case of *Robertson v. Cheynes*, 6th February 1847, which contains references to the previous authorities. This case exemplifies the rule with peculiar force, inasmuch as the interest

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ENDURANCE OF
SUBMISSION,
cont'.
M. 639.
F. C. App^r. p.
2 S. 382.
5 S. 154.
Inst. iv. 3, 29.
5 S. 906.
SUBMISSION
FALLS BY DEATH
OF EITHER
PARTY.

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SUBMISSION
FALLS BY
DEATH, CONT'D.

of the deceased party had here become vested in an assignee, who was desirous to become a party, and proceed with the submission. We have already seen, that a submission falls by the death of one of several parties upon the same side as in the case of one of several tutors personally bound. The risk of expiration by the death of a party may be obviated by a provision in the deed, that the submission shall not fall by the death of either party. This effect will not be produced indirectly, as by an obligation on the party and his heirs and executors to implement the decree-arbitral. That is the usual form of obligation, and it does not remove the implied condition of the contract, that the decree shall be pronounced during the life of the party. In order to prevent lapse by death of party, there must be a distinct substantive declaration, that the submission shall not thereby fall. The efficacy of such a declaration was fully recognised in *Ewing & Co. v. Dewar*, 19th December 1820. It need scarcely be remarked, that the death of the arbiter puts an end to the submission. This, as well as the doctrine of expiration by death of party, is stated in the ancient case of *Macanqual v. Boswell*, 14th May 1563.

EFFECT OF
PARTY'S BANK-
RUPTCY ON SUB-
MISSION.

A submission does not fall by the bankruptcy of a party, even though his property, and of course the interest in the matter submitted, be judicially transferred from him, as in a sequestration. The submission still subsists, but, in order that the proceedings in it posterior to the bankruptcy may be effectual, they must be notified to the trustee for the creditors, in order that he may appear for their interest; *Grant v. Girdwood & Co.*, 23d June 1820. In the previous case of *Barbour v. Wight*, 21st November 1811, a decree-arbitral, pronounced after one of the parties became bankrupt, was set aside, because his creditors had not been made parties to the submission, or heard for their interest.

EXCEPTION TO
RULE OF PER-
SONALITY OF
SUBMISSIONS.

An exception to the general rule of the personality of submission, occurs in cases where the submission forms an essential part of another contract, as, for example, in a lease with a clause of arbitration for determining emerging questions and rights; *Montgomerie v. Carrick*, 23d June 1848. The submission in such a case is necessarily equal in endurance with the contract out of which the questions are to arise, and all decrees during the currency of the contract are interim awards, for it is not in the arbiter's power to pronounce a final decree till the contract expires. See the continuation of the same case, *Montgomerie v. Carrick*, 8th December 1849.

3 S. 4.

A submission does not fall by the institution of an action of reduction of it, and an effectual decree-arbitral may be pronounced, notwithstanding the dependence of such an action; *Abbott & Son v. Skelton*, 12th May 1824. And, although the decree pronounced in a submission may be inept, that circumstance does not exhaust the

submission, which may still be proceeded with, till the question is disposed of by an effectual award; *Reid v. Walker*, 15th December 1826.

By the expiration of the time limited in the submission, the proceedings simply come to an end, and any decree pronounced afterwards is null; *Donaldson v. Donaldson*, 26th January 1770. The proceedings of the arbiters, however, after the submission has expired, may be made valid by the homologation of the parties, as by their appearing and pleading, or otherwise acting as if the submission were still in dependence. This was one of the grounds of decision in *Fleming v. Wilson & M'Lellan*, 7th July 1827, where the opinions of the whole Court were taken. The submission was, by a favourable construction, held to subsist so as to include the day betwixt and which the arbiters are appointed to decide; and so, where arbiters were to determine betwixt and the 22d day of December, these words were held to include the 22d day of December within the period of the submission; *Cockburn's Relict v. Edward*, 31st January 1724; and a decree-arbitral pronounced *in ipso termino*, therefore, is valid; *Wilson v. Haddo*, 30th June 1694. From the same favourable regard to this contract, when the period by its terms (from the insertion of a blank) extends to a year, or, as now settled, a year and day, it is reckoned from the date of the last subscription; and this rule was applied, so as to make the period endure for a year after the subscription, not of the principal parties who had signed of previous dates, but of a person subscribing merely as a cautioner that one of the parties should implement his part of the obligation; *Taylor v. Grieve*, 25th November 1800. It was long held, upon the authority of Erskine, that a submission with a blank, executed upon a particular day, lasted till that day year, because that was the latest day with which the blank could be filled up. In the case, however, of the *Earl of Dunmore v. M'Inturner*, 13th May 1829, it was contended, on the authority of Lord BANKTON, and of the old case of *Menzies v. M'Grigor*, February 1665, that the endurance is for a year and a day; and the Court having inquired into the analogous practice in the proceedings of Court, and found, that a process does not fall asleep until a year and day from the date of the last interlocutor, it was decided, that, where a submission had been prorogated on 5th February 1823 to the blank day of blank, it endured for a year and a day, and was again validly prorogated upon the 6th day of February 1824. The same principle which applies to prorogations applies also to submissions themselves.

The functions of the arbiters must, however, be completely executed before the submission expires, and, therefore, a decree was found null, although the award had been pronounced within the period, the decree not having been signed till afterwards; *Watson v. Milne*, 18th November 1696; and the same was held by a large majority of the

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ENDURANCE OF
SUBMISSION,
cont'd, see p. 391.
5 S. 140.
M. voce, "Ar-
bitration,"
App^x. No. 1.
5 S. 906.
M. 640.
M. 647.
M. voce, "Ar-
bitration,"
App^x. No. 8.
Inst. iv. 3, 29.
7 S. 595.
M. 639.

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15 D. 38; see note, p. 395.

PROROGATION,
HOW EXECUTED.

whole Court in *Lang v. Brown*, 23d November 1852, affirmed on appeal as to this point.

Prorogation of Submission.—A submission is continued in effect by PROROGATION, which is an act extending the period after the term limited by the deed; and this may be done by the parties either in writing, or *rebus ipsis et factis*. It may also be done by the arbiters, if they are empowered by the submission to prorogate. It is unnecessary that the prorogation be probative. This, like the devolution, is regarded as a step of procedure in the cause, which is sufficiently authenticated by the writing of the clerk and the arbiter's signature, without further solemnity; *Stewart v. Waterstone*, 8th March 1804, a case which establishes this principle in regard to both prorogation and devolution. See also the case of *Gordon v. Monteith*, 10th December 1812. It is no objection to a prorogation that it is not written separately on stamped paper, and it may be indorsed upon the deed of submission itself; *Paterson v. Sanderson*, 15th May 1829. Prorogation results only from a distinct act to that effect, and will not be presumed; and, therefore, a decree-arbitral was reduced, notwithstanding that it was executed within twelve months of the devolution upon the oversman, which, it was contended, was to be held as a second submission, or as implying a virtual prorogation, and so giving the submission currency for a year from its date; *Thomson v. Norton*, 28th January 1818. We have already seen a submission effectually prorogated by homologation in the case of *Fleming v. Wilson & M'Lellan*, 7th July 1827. This principle is fully recognised in England, where it has been repeatedly decided, that, if the parties attend the arbitrator after the time appointed has expired, or do any other act which recognises the subsistence of the reference, or of the arbitrator's authority, that alone is evidence of a new agreement to submit; and there is a case reported, in which the solicitor of a party having, after the expiration of the time, written to the arbiter, urging him to reconsider, that letter was held a consent to enlarge the time. Even where arbitrators appointed an umpire without authority, the parties having attended the umpire were held to have bound themselves.

If the arbiters have power to prorogate, it is no objection to their prorogation, that appearance cannot be made for one of the parties at the date of the prorogation; and, therefore, in a submission which was declared not to fall by the death of the parties, one of whom was trustee upon a sequestrated estate, a prorogation executed after the death of the trustee, and before the appointment of his successor, was held to be effectual; *Ewing & Co. v. Dewar*, 19th December 1820.

The effect of the prorogation is to continue the submission and everything connected with it upon the same footing, as if the time prorogated had been embraced in the original contract. In the words of an English Judge, "The agreement to enlarge the time for making

M. 16911.

F. C.

7 S. 616.

F. C.

5 S. 906.

2 Jarm. &
Byth. Convey-
ancing, 646.

F. C.

EFFECT OF
PROROGATION.2 Jarm. &
Byth. Convey-
ancing, 645.

“ the award must be understood as by reference virtually incorporating
 “ in itself all the antecedent agreements between the parties relative
 “ to that subject, as if the same had been formally set forth, and
 “ repeated therein.” The decision in the case of *Langs v. Brown*, 23d 15 D. 38.
 November 1852, appears to be in accordance with the principle just
 stated. It was there held by a majority of the whole Court, that pro-
 rogation by an oversman keeps the whole submission in force, although
 certain limited points only of the dispute were devolved upon him,
 and that the arbiters, therefore, might competently execute a decree-
 arbitral upon matters not devolved, after the date when, but for the
 oversman's prorogation, the submission would have expired.*

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Powers of Arbiters.—The powers of the arbiters correspond to their
 duties, which are to investigate and decide justly the matters sub-
 mitted. The ordinary course of procedure is for the arbiter, first, to
 write an acceptance of the submission, appoint a clerk, and pronounce
 an order upon the parties to lodge their claims. These it is his duty
 to consider—to order written answers if requisite—to hear the parties
 personally, or by their advisers—to receive the evidence which they
 may tender in support of their own claim or against the claim of the
 other party. It is generally advisable, that he issue notes of his opi-
 nion before deciding, and allow the parties an opportunity of being
 heard again, if they desire it, which will afford security against error
 in fact or judgment. Such is the general course of procedure; but
 some portions of it are not obligatory in any submission, and some
 are dispensed with in submissions of a special character. We shall
 notice such parts of the procedure as are indispensable :—

POWERS OF
 ARBITERS.

And, first, it is well settled that an arbiter cannot decide without
 hearing the parties. By the Act of Sederunt, 2d November 1695,
 already referred to as containing regulations made under Parlia-
 mentary authority, and which therefore has the same force as a
 Statute, it is enacted in the 25th section, “ That, for the cutting off of
 “ groundless and expensive pleas and processes in time coming, the
 “ Lords of Session sustain no reduction of any decreet-arbitral, that
 “ shall be pronounced hereafter upon a subscribed submission, at the
 “ instance of either of the parties submitters, upon any cause or
 “ reason whatsoever, unless that of *corruption, bribery, or falsehood*,

ARBITER MUST
 HEAR PARTIES.

Act of Regula-
 tions, 2d Nov.
 1695.

* This case was reversed upon appeal, 8th May 1855, upon the ground that the power of 2 Macq. App.
 prorogation by an oversman is confined to the matters referred to him. The Lord Chancellor 93.
 (CRANWORTH) laid it down, that, when an instrument of devolution is executed, the oversman
 is placed in the same position as if there were no other matters in dispute than those referred
 to him. He possesses a discretionary power of prorogation under the deed, but he can only
 exercise this power on the points which have been submitted to him, and which alone are
 before him. He cannot prorogate the submission *in toto*. The principle laid down in the
 text may, therefore, be thus qualified—that the effect of a prorogation is to continue the
 submission, in regard to the matters in dependence before the party prorogating, upon the
 same footing as if the time prorogated had been embraced in the original contract.

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ARBITER MUST
HEAR PARTIES.
See *infra*, p.
406.

3 Dow's App.
102.

3 S. 488.
13 S. 356.

CORRUPTION,
HOW INTER-
PRETED; see
infra, p. 401.

5 Dow's App.
247.
6 D. 186.
10 D. 1102.

"to be alleged against the Judges-arbitrators who pronounced the "same." But although the objections competent to a decree-arbitral are here limited to the three points of corruption, bribery, or falsehood, chargeable against the arbiter, that limitation does not put it into his power to disregard the fundamental rules of justice, and he cannot, therefore, effectually decide, if he hears one party and not the other, or if any party by design or accident has been excluded from any portion of the procedure adopted by the arbiter as necessary to ascertain the justice of the case. A decree pronounced in such circumstances cannot stand. This was decided by the House of Lords, reversing the decision of the Court of Session, in *Sharpe v. Bickerdyke*, 24th February 1815. Here the arbiter required the parties to admit in writing that they had nothing more to offer, and that they desired a decision on the case as it stood; and he proceeded to decide under the erroneous impression, that such a written admission had been made, the fact being that it had not been signed by one of the parties, who had material evidence to produce. In deciding this case, Lord ELDON observed, "That by the great principle of eternal justice, which was prior to all these Acts of Sederunt, regulations, and proceedings of Court, it was impossible that an award could stand, where the arbitrator heard one party and refused to hear the other; and on this great principle, and on the fact that the arbitrator had not acted according to the principle upon which he himself thought he ought to have acted, even if he decided rightly, he had not decided justly, and, therefore, the award could not stand." The same principle has been applied in the subsequent cases of *Heggie & Co. v. Stark*, 1st February 1825, and *Earl of Dunmore v. M'Inturner*, 28th January 1835. It cannot be laid down as an invariable rule, that the arbiter must receive all evidence tendered by a party. This will depend upon whether the proof offered be essential to justice. The term *corruption*, in the Act of Regulations, has been construed so as to comprehend culpable neglect by the arbiter, and a disregard on his part of what is essential to justice. According to Lord MACKENZIE, in the case of *Mitchell*, presently to be cited, corruption "includes any plain failure in duty distinct from an error in judgment." But a refusal of evidence is not necessarily a refusal of justice; and in that class of cases particularly, in which the arbiter is selected on account of his own skill and knowledge in the matter submitted, he is not bound to receive evidence of other skilled persons, tendered with a view of influencing his own judgment; *Johnston v. Cheape*, 10th July 1817; *Macdonald v. Macdonald*, 8th December 1843.* The case of *Mowbray v. Dickson*, 2d June 1848, is an

* Under a mineral lease it was stipulated, that the value of coal left unsold by the lessees at the expiry of the lease should be ascertained by arbitration. In a reduction of the award, on the ground that it had been pronounced without hearing parties, it was held, that the

example of a decree-arbitral being sustained with great difficulty, where the arbiter decided without receiving evidence offered. But, where an arbiter has once allowed a proof, delay from innocent accident in the taking of that proof will not warrant his proceeding to decide without it; *Mitchell v. Cable*, 17th June 1848. In that case the arbiter had allowed both parties a proof. Under this order the one party examined five witnesses, the other only one. The latter party having applied for a renewal of the commission, upon the ground that his whole proof had not been reported *debito tempore* through an accident for which he was not responsible, the arbiter refused this, and decided against him "after having considered the proof taken." The decree-arbitral was reduced, and the decision went upon the principle, that, if an arbiter chooses to examine on one side in regard to a particular fact, he is bound to admit the evidence tendered on the other side in regard to the same fact. The Lord President BOYLE observed:—"I hold that the word *corruption* must receive a very broad construction. I hold that under it we are entitled to insist, not only that justice must be done, but that it must be done in a proper manner; and I am of opinion, that that has not been the case here, where the arbiter has decided on a half proof, all on one side." Lord FULLERTON said:—"An arbiter may, in some cases, think that his own information is sufficient to enable him to do justice; he may determine that proof is irrelevant or unnecessary, and refuse to receive it. But, most unquestionably, if he hears one party, he cannot refuse to hear the other. And, in the same way, if he allows a proof, he cannot decide on the proof brought by one party to the exclusion of that which is brought, or offered to be brought, by the other. Whether this can be brought under the head of *corruption*, or is to be viewed, perhaps more justly, as a breach of an implied condition in all submissions, it is unnecessary to inquire. The competency of challenging a decree-arbitral on such a ground must now, since the decision of the case of *Sharpe*, be considered as a fixed principle of our Law." Lord JEFFREY said, "The true principle is, that the decree-arbitral can stand only when he (the arbiter) has done his duty *fairly*. I do not mean *fairly* in reference to his moral dispositions; but he is bound to shew this Supreme Court that he has dealt *fairly*, that is, *equally*, with both parties. Otherwise, it must be held, that he has violated the contract of submission."*

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contd.
10 D. 1297.

duty of the arbiter here was an exercise of skill, and that in such case it was not a relevant ground of reduction, that parties had not been heard; *M'Nair's Trustees v. Roxburgh*, 17 D. 445. 16th February 1855.

* In the case of *Miller & Sons v. Millar*, 10th March 1855, a decree-arbitral was sustained 17 D. 689. by the whole Court, although pronounced without examining a witness, whom the arbiter had proposed to examine; and very fine distinctions were drawn between that case and the case of *Mitchell v. Cable*. The chief ground of decision seems to have been, that the party who

3 Dow's App.
102.

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ATTENDANCE
OF WITNESSES
BEFORE AR-
BITER.

4 S. 809.

14 D. 590.
See *infra*, pp.
405, 406.

M. 634.

5 Dow's App.
247.4 S. 66; 2 Wil.
and Sh. App.
314.ARBITER MUST
NOT GO *ultra*
vires compromi-
ssis.

M. 626.

An arbiter has not power to compel the attendance of witnesses, but a compulsory order can be obtained from the Court of Session or the Judge Ordinary, upon an application authorized by the arbiter. Formerly, applications for letters of supplement to cite witnesses before arbiters were made to the Lord Ordinary upon the bills, but, by the case of *Harvey v. Gibsons*, 7th July 1826, it was settled that the proper form of application is by petition to the Court of Session or Judge Ordinary. If a witness refuses to produce documents, on the ground of confidentiality, although that objection has been overruled by the arbiter, it is competent to present a petition to the Sheriff, without recommendation of the arbiter, to order production under sanction of imprisonment; *Blaikie v. Aberdeen Railway Co.*, 2d March 1852. Here the diligence had, in compliance with the ordinary practice, been applied for and obtained from the Sheriff, under a recommendation from the arbiter; and the sheriff's warrant for imprisonment was sought on the supposition, and as the consequence, of a failure to obey the sheriff's order for production, which the petition likewise prayed for. It was competent, however, for the respondent to shew cause upon the merits why he should not obtemper the order, but that did not affect the competency of the application. The Court will not compel a witness to leave the county in which he lives, to appear before arbiters; and, in such a case, the proper course is for the arbiters to appoint a Commissioner to take the evidence; *Gordon v. Neilson*, 16th July 1741. An arbiter is not bound to issue notes of his opinion before deciding, or to exhibit a draft of the decree-arbitral before it is executed; *Johnston*, already cited; *Macallum v. Robertson*, 3d June 1825, affirmed 23d May 1826. In the latter case it is only in the report of the appeal that this point appears.

The arbiter's powers are limited by the terms of the submission, and he cannot in his award go *ultra vires compromissi*—that is, he cannot decide points not referred, or give an award of greater amount than the submission warrants. Thus, a decree-arbitral, having awarded a larger penalty than the submission contained, it was annulled *quoad excessum*; *Grosat v. Cunningham*, 24th January 1739; and a decree-arbitral was reduced, which decerned for a larger sum than the price fixed by the contract containing the submission; *Napier v.*

maintained that the refusal to examine inferred corruption, sought the examination of the witness, in order to support a view which the arbiter had determined to be irrelevant; and that the arbiter, in support of the view which he himself considered relevant, was not bound to examine all the witnesses which were produced, or offered to be produced, on that side, but was entitled to determine the amount of proof with which he should be satisfied. It was in reality not a refusal of evidence tendered by one party, where both parties were at issue upon the same point, as in *Mitchell's* case.

The decision was pronounced, however, by but a small majority; and it is important to remark, that observations fell from some of the Judges, calculated to impugn the statutory authority of the Act of Regulations.

Wood, 29th November 1844. The general rule, however, is, that when an arbiter exceeds his powers, the award is supported in so far as authorized by the terms of the submission, and reduced only with regard to the excess. Thus, where an arbiter directed mutual general discharges, although the parties had only submitted particular claims, the Lords found the decree obligatory as to all that had been submitted, and rectified the general discharges by limiting them to what had been contained in the parties' claims; *Crawfurd v. Hamilton*, 25th December 1702; and the same rule was applied, where the arbiter had awarded expenses contrary to an express provision in the submission; *Kidd v. Paterson*, 19th June 1810; and where the F.C. oversman had erroneously awarded a fee to the arbiters; *Stewart v. Ross*, 21st February 1822. This rule, however, is necessarily limited to the cases in which the matters decided are capable of separation. Where the points are so mixed, that the decision of one cannot be removed without affecting that of another, the decree will be reduced *in toto*, of which we have an example in a case already cited; *Reid v. Walker*, 15th December 1826. An arbiter, therefore, cannot decide more than is submitted. Can he decide less? Can he dispose of a part only of the matters submitted, leaving the remainder undecided? In an old case, *Wishart v. Falconer*, 23d June 1625, a decree-arbitral was reduced, on the ground that it determined the claims of only one party, leaving the other party's claims undecided. Questions on this point now are generally obviated, by giving power to the arbiter to pronounce *interim* decrees, and there is no doubt of the validity of an *interim* decree given under such a power; *Lyle v. Falconer*, 2d December 1842. It does not appear to have been settled by any decision, whether an *interim* decree be competent, when not specially authorized; but the inclination of the Judges' opinions in the case just cited was, that arbiters have power to issue *interim* decrees without express authority to that effect, especially when the matters referred are articulate and separable, a distinction expressly recognised in the case of *Lord Lovat v. Fraser*, 22d June 1738. When a valid *interim* decree has been pronounced, it will receive effect, although the submission should terminate without a complete decision of the whole matters referred; *Taylor v. Neilson and Fulton*, 19th January 1822; *M'Kessock v. Drew*, 14th November 1822.

The next point is, whether an arbiter, who has accepted a submission, can be compelled to give a decision? By the Roman law, an arbiter by accepting became bound to decide; and, in order to make sure of a decision, it was customary by our ancient practice for the arbiter to subscribe the deed of submission, which then contained a consent to summary diligence against himself for the purpose of enforcing a decision. This part of the style has long been in disuse;

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7 D. 166.

M. 6835.

1 S. 335.

5 S. 140.

M. 17,018.

INTERIM DECREE-ARBITRAL.

5 D. 236.

M. 625.

1 S. 253.

2 S. 13.

CAN ARBITER
BE FORCED TO
PROCEED?

- PART II. but, in the case of *Marshall v. Edinburgh and Glasgow Railway Company*, 26th March 1853, it has been decided that an arbiter, after accepting a submission, is bound to go on and decide the matter referred, although he cannot now be compelled by a charge, as he does not subscribe the deed. This is the law of Scotland, and the case of *Cheisly v. Calderwood*, 30th June 1690, is not sufficient to alter it.
- CHAPTER VI.
15 D. 603.
- M. 632.
- AWARD, WHERE SEVERAL ARBITERS.
M. 14720.
- 4 S. 53.
4 S. 66;
2 Wil. & Sh.
App. 344.
- M. voce "Arbitration," App. No. 3.
- M. 628.
- 3 D. 318.
2 Bell's App. 43.
- ARBITER MAY CALL IN ASSISTANCE, AND AWARD EXPENSES.
4 S. 330.
- 5 D. 456; 4 Bell's App. 161.
- REMUNERATION OF ARBITERS.
- When there is a plurality of arbiters, their decision must be unanimous, if the submission contained no power to a majority to decide; *More v. Grier*, 10th February 1693. It was in order to avoid the risk of such a result, that the old statute of James I., 1426, cap. 87, now in desuetude, declared all submissions to be null, unless an odd number of arbiters was appointed, the majority at that period having power to decide. When a majority is empowered to decide, the decree-arbitral is effectual, though not subscribed by the minority; *Love or Brodie v. Love*, 1st June 1825; *Macallum v. Robertson*, 3d June 1825, affirmed on appeal.
- If an *error calculi* be committed, the Court will rectify that without reducing the award; *Hetherington v. Carlyle*, 21st June 1771. But when the arbiter has issued his decree-arbitral, he is entirely divested of his powers, and the decree is the only legal evidence of his meaning. An arbiter cannot, therefore, be examined, in order to obtain explanations of ambiguity in his award; *Woddrop v. Finlay*, 4th February 1794. This is a strong argument, therefore, for the use of clear and unambiguous language in framing the decree-arbitral. But, if the award contains a reference to the arbiter's notes, these may be read as part of the award. It was held otherwise by the Court of Session in *Mackenzie v. Girvan*, 19th December 1840, affirmed, but with a difference of opinion on this point, 9th March 1843.
- An arbiter has a reasonable discretionary power to employ such assistance as may be requisite to enable him to perform the duty committed to him, and the parties are, therefore, liable for any expense thus incurred; *Macleod v. Bisset*, 17th December 1825. Here a party was found liable for the fee to an accountant employed by the arbiter. The arbiter has it also in his power to award expenses to either party. This is contrary to the opinion and practice which prevailed till a comparatively recent period. But the doctrine is now fixed by a series of recent decisions. The last is that of *Ferrier v. Alison*, 28th January 1843, affirmed 18th April 1845.
- It may be stated as a general doctrine of the law, liable to exception only in very special circumstances, that an arbiter in a private submission has no legal claim for remuneration. This results from the principle, that arbitration is viewed as a public function, and the arbiter does not stand in the relation, in which one working for hire

does to his employer. No diligence can be exacted from him, and the result of his labour is not liable to be quarrelled or impugned. Notwithstanding these general principles, however, an arbiter has been found entitled to sue for a fee, where he was in a humble rank, and the object of the submission was to obtain the benefit of his professional skill and labour, upon the exercise of which his daily subsistence depended. This judgment, however, was given with great difference of opinion upon the bench; *Macallum v. Laurie*, 26th F. C. June 1810. The general doctrine, that an arbiter is not entitled to insist for a fee, received effect in the case of *Kennedy v. Kennedy*, F. C. 20th January 1819, and in *Paterson v. Earl of Breadalbane*, 19th February 1819, contained in a note subjoined to the former case. By the latter decision it was enforced, to the effect of refusing a fee to a professional architect. On the other hand, where the arbiters were the ordinary law-agents of the parties, and made charges for trouble in the submission, that being done openly, the Court held it no objection to the validity of the proceedings; *Lyle v. Falconer*, 2d 5 D. 236. December 1842. An arbiter may, however, before accepting or proceeding with the submission, stipulate for remuneration, and his doing so does not infer corruption so as to vitiate the submission; *Fraser v. Wright*, 26th May 1838. The case of *Stuart v. Ross*, 21st February 1822, shows, that arbiters are entitled to find the parties liable for the trouble and expense of the clerk to the submission.

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REMUNERATION
OF ARBITERS,
contd.

We have already had occasion to notice the importance of the decree-arbitral being clear and explicit in its terms; it must also be executed with the statutory solemnities; *Short v. Habkin*, 3d July 1711. Here a decree-arbitral was found null, because the writer's name and designation were not inserted. It seems to have been argued, that informality is not among the grounds of reduction admitted by the Act of Regulations 1695, and the answer was sustained, that, without the legal formalities, it was not a decree-arbitral in the sense of that Act. We had formerly occasion to refer to a later decision to the same effect; *Percy v. Meikle*, 25th November 1808. The decree-arbitral may be written upon the same sheet of stamped paper with the submission, because they form part of the same contract; *Drew and M'Millan v. Manson*, 31st January 1787.

SOLEMNITIES
OF DECREES-
ARBITRAL.
Infra, p. 404,
note.
M. 16,867.

Grounds of reduction of decrees-arbitral.—We have already pointed out the effect of the Act of Regulations 1695, in limiting the grounds of reduction of a decree-arbitral to the specified grounds of corruption, bribery, and falsehood. The effect of this Act, as possessing statutory authority, is well known, and has been expressly recognised in the Court of Appeal. A distinction was, at one time, taken between different classes of submissions, so as to exempt from the

CORRUPTION—
BRIBERY—
FALSEHOOD.
See *infra*,
p. 407.
2 Bell's App.
48.

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GROUNDS OF
REDUCTION OF
DECREE-ARBITRAL.

operation of the Act of Regulations references to men of skill to settle the terms of a bargain. The referees selected for such a purpose were accounted *arbitrators*, and not *arbiters*—that is, not absolute Judges, but to give an opinion which might be corrected by the Judge, if manifestly unjust; the reference in such matters of adjustment, which was styled the reference of a *negotium*, being distinguished from the reference of a *lis* or controversy. Effect was given to this view in the case of *Robertson v. Clephan*, 16th July 1756, and a remit was made to the Lord Ordinary to hear parties upon the equity of the determination of the arbitrators. The same distinction was again pleaded in *Morrison v. Aberdeen Market Company*, 11th March 1847, but the Court would not recognise it, and held that the Act of Regulations is, by established usage, applicable to the submission of a *negotium* as well as of a *lis*, the view taken in the case referred to not having been carried out and engrafted into our law.

5 Br. Supp.
852.

9 D. 910.

CORRUPTION;
see *supra*, p.
396.

The term *corruption* in the Act of Regulations, we have seen, is held to apply to any omission or failure in duty on the part of the arbiter, calculated to defeat the essential principles of justice. Nor will the limitation of the grounds of reduction be allowed to support a decree-arbitral obtained by the fraud of a party; and there is an example of a decree being reduced on the ground of such fraud, in *Logan v. Lang*, 15th November 1798. The effect of the Act of Regulations in excluding all judicial correction of a decree-arbitral, except upon the grounds specified in that Act, is shewn in *Glasgow, Barrhead, and Neilston Railway Company v. Nitshill Coal Company*, 23d December 1848, where the Court refused to interfere on the ground of alleged excess of valuation in a decree. This case also shews the effect of a general submission in embracing all questions between the parties.

M. voce "Ar-
bitration,"
App^x. No. 6.

11 D. 327.

FALSEHOOD.

Under the head of falsehood in the Act of Regulations is included the forgery or vitiation of the decree-arbitral by an arbiter.

1 Dow's App.
223.

The discovery of new matter after a decree-arbitral is issued is no ground for reducing it, although the production of it in time might have prevented the decision; *Sharpe v. Bury*, 17th May 1813.

FOREIGN DE-
CREES-ARBI-
TRAL.M. voce "Ar-
bitration,"
App^x. No. 4.

It remains only to be noticed, that a foreign decree-arbitral may be enforced in Scotland, and is protected by the Act of Regulations, limiting the grounds of reduction, and cannot, therefore, be challenged on the ground of iniquity; *Johnson v. Crauford*, 13th December 1776.

We have already seen, in treating generally of the delivery of deeds, that a decree-arbitral, in order to be binding, must be delivered or registered.

Enforcement of Decrees-arbitral.—As the power of the arbiter is simply to decide, he cannot of himself compel performance. The measure of his functions is the authority with which the parties in-

vest him ; and if, therefore, the submission only empowers him to decide, and simply obliges the parties to implement his decision, then the decree-arbitral must be enforced under that obligation by an ordinary action at law, the arbiter having no power in such a case to grant a warrant for diligence. Should the submission contain a consent to registration, that will not warrant diligence, unless there be a consent to registration of the decree-arbitral, as well as of the submission ; *Knox v. Hume*, 12th March 1707. In order, therefore, that the decree-arbitral may be a warrant for summary diligence, the parties must give an express consent to that effect, and such consent may be given either in the submission or in a separate writing ; *Baillie & Rogers v. Pollock*, 19th May 1829. Here the consent was contained in a minute indorsed on the submission during the course of the proceedings. The decree-arbitral is not a warrant for diligence, unless the document containing the party's consent to registration be also produced ; *Muirhead v. Stevenson*, 19th February 1848.

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REGISTRATION
OF DECREE-
ARBITRAL.

M. 625.

7 S. 619.

10 D. 748.

Style of the Submission.—The examination which we have made of the legal requisites and effects of the deed of submission sufficiently shews what is essential in its construction and terms, and it is unnecessary, therefore, to go over the style in detail. In the Juridical Styles there is the form of a general submission, by which the parties refer all questions, claims, and differences, to two arbiters, or, in case of their differing, to an oversman named. It is properly provided, that, in case the oversman appointed by the parties should fail by death or non-acceptance, the submission shall devolve upon any other oversman whom the arbiters shall appoint. Without such a provision, the arbiters have no power to appoint an oversman. Power is next given to the arbiters to receive the parties' claims, and take proof by writ, witnesses, or oath of party. Then the parties bind themselves to implement whatever the arbiter or oversman shall determine before a day left blank, which we have seen fixes the duration of the submission to a year and a day, and the arbiters or oversmen have power to prorogate at pleasure. This power the arbiters can only derive from the parties. The obligation to implement is sanctioned by a penalty, which forms a *medium* for recovering the expense of enforcing the decree-arbitral. Then there is a provision, that the submission shall subsist, and the decision be binding, notwithstanding the death or bankruptcy of either party. This is indispensable to obviate the contingency of death. The bankruptcy of a party does not terminate the submission ; but in this, as well as in other respects, it is advisable to adhere to the established form. We have next a very useful provision, to the effect that, in case no final decree-arbitral shall be pronounced, the proof taken in the course of the submission shall be received as legal probation, *quantum et quale*,

STYLE OF SUB-
MISSION.

Vol. ii. p. 163.

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p. 402.

in any after submission or process at law between the parties regarding the same matter. This provision may tend materially to save trouble and expense, and to prevent the lapse of the submission by inadvertence or otherwise from entailing a total sacrifice of the proceedings under it. Then we have a consent to registration of the submission, and of the prorogations, and *interim* or final decrees-arbitral, for summary execution. This, as we have found, is indispensable with a view to summary diligence, which cannot proceed unless the parties consent that the decree-arbitral, as well as the submission, shall be registered for that purpose; and it is proper also to specify *interim* decrees here, this being, according to the style before us, the only express authority to pronounce *interim* decrees, a power the exercise of which without warrant from the parties has not been recognised by any express authority. Power to award expenses may be inserted, although it is now well ascertained, that the arbiter has an inherent power to make such an award.

THE PROROGATION.

Form of the Prorogation and Devolution.—The prorogation is in the simplest terms, thus:—"I, the arbiter within named, do hereby, in virtue of the powers conferred on me, prorogate the time for determining this submission to the day of . . ."

THE DEVOLUTION.

The devolution is equally simple:—"We, the arbiters within named, do hereby nominate and appoint A. to be oversman, in case we shall afterwards differ in opinion." If a difference have already occurred, that fact will be stated as the cause of the nomination. A prorogation or devolution by the parties themselves is in terms equally simple. These writings, we have seen, are legally regarded as incidental steps of procedure, not requiring to be attested by the legal solemnities.

See *supra*, p. 401.

Style of Decree-arbitral.—The decree-arbitral must be attested.*

* The judgment or report of a judicial referee requires neither to be holograph nor tested, the parties making the reference being held to have contemplated the form in which judicial referees make their reports, and to have consented that the authority of the Judge should be interponed to a report drawn up in that form.

7 Bell's App. 171.

The opinion of counsel given upon a mutual memorial is binding as a decree-arbitral, though authenticated merely by the counsel's signature. The parties are held to have had in view the invariable form in which the opinions of counsel are embodied; *Fraser v. Lord Lovat*, 29th July 1850.

A Scotch submission to an arbiter resident in England contained no provision as to the particular form in which the decree-arbitral was to be authenticated. The arbiter issued an award, which was defective in the solemnities essential to make such a deed probative by the law of Scotland, but was nevertheless binding upon the parties by the law of England. It was held, in conformity with the opinions of the majority of the whole Judges, "that, to give validity to a decree-arbitral pronounced by Mr. Taylor in England under the submission in question, it was not essential, that such decree should be contained in an instrument duly authenticated according to the forms which the law of Scotland would require in such an instrument, if executed in Scotland; and that this Court can take cognizance of, and competently interpose its authority to, a decree-arbitral contained in an instrument signed by Mr. Taylor in England, which the Court are satisfied is authentic, and does truly and

There are not any *voces signatæ* of indispensable use in a decree-arbitral. If it is separate from the submission, it will narrate the terms of it, and, in particular, the statement or description of the matter submitted. It will narrate also the acceptance, the prorogations, if there are any, and, where the decree is by an oversman, the fact that the arbiters differed must appear. The procedure may also be stated in general terms, as that the arbiters received the claims of the parties, and their written pleadings—that he has heard them *vivâ voce* by themselves or their agents or counsel—and that he has considered the whole pleadings and the evidence adduced by each party; and then the decree usually proceeds in these terms:—*“And being well and ripely advised in the matter, and having God and a good conscience before my eyes, I do hereby give forth and pronounce my final sentence and decreet-arbitral, as follows, viz.”* &c. Then is given the import of the decision, which, as we have already had occasion to remark, must be expressed in language free from ambiguity. If the result is, that either party is to pay a sum to the other, he will be decerned and ordained to make the payment with interest from a date specified, and thenceforth until payment. If expenses are awarded, the party who is to pay them will be found liable to the other in the expense of the deed of submission and the expenses incurred in the course of the proceedings, payment of which will be decerned for as well as payment of the expense of recording the submission and decree-arbitral. It is usual, although not necessary, to decern for the penalty contained in the submission, and the arbiter ordains the submission, acceptance, prorogations, and decree-arbitral, to be registered to the effect specified in the submission. Upon registering these documents an extract will be obtained, containing a warrant for diligence in the form prescribed by the recent statute.

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DECREE-ARBITRAL MUST BE PROBATIVE.

The Judicial Reference.—Arbitration is frequently resorted to in the form of Judicial Reference, which takes place where, the matter in dispute having become the subject of an action, the case is submitted to a private arbiter upon the suggestion of the Court, or, it may be, upon the proper motion of the parties themselves. This may be done by taking the suit out of Court and executing a deed of submission, but the most common, and generally the most beneficial, course is to go to the arbiter under a remit from the Court. By this method no deed is required, for the cause in dependence, and the reference becomes a part of the judicial procedure. The parties by

“correctly express the final decision of the arbiter, although such instrument is not authenticated according to any forms other than have been observed in regard to the instrument in question; *Earl of Hopetoun v. Scots Mines Company*, 6th March 1856.”

18 D. 739.

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their counsel state in a minute, that they have agreed to refer the action to a person named, and that the judgment of the Court in terms of the referee's decision or report shall be final and conclusive. The Court interpones its authority to this minute, and remits to the referee to consider the question, and to report his judgment. The referee, then, proceeds with the case, receiving the parties' evidence and pleadings, written or oral or both, and pronounces his judgment, which may be embodied either entirely in a report stating the result in the form of findings, or in the shape of a decree-arbitral containing a decerniture. In either form it has no effect until it is reported, and the authority of the Court interponed.

PROCEDURE
UNDER JUDICIAL
REFERENCE.

It is not necessary here to examine in detail the proceedings under a judicial reference. In form and effect they are similar to those of a private submission, with the exceptions necessarily resulting from the distinction, that, while in the submission the arbiter's powers are derived directly from the parties, and limited by the terms of the reference, the judicial referee, in all matters relating to the investigation and judgment of the case, has the same power as the Court would have exercised, had no remit been made. It results from this distinction, that the judicial reference does not, like the submission, lapse by the death of a party, but, being in reality a depending action, it subsists against his representatives; *Watmore & Taylor v. Burns*, 17th May 1839. As the action continues to depend, notwithstanding the reference, the same facilities can be obtained for citing witnesses and havers before the arbiter, as in an ordinary suit; and this constitutes a marked advantage of the judicial reference over the private submission. For the same reason, the parties continue amenable to the authority of the Court in the proceedings before the referee, and any irregularity or attempt to impede the proceedings or defeat the ends of justice may be summarily corrected and punished by the power inherent in the Court to vindicate its own authority and punish contempt. Of this an illustration is afforded in the case of *Shanks v. Tenant*, 6th June 1816. Here a party having abstracted and destroyed a minute of reference on discovering that the referee's opinion was unfavourable, it was held competent for the sheriff before whom the action judicially referred depended to grant summary warrant of imprisonment, to compel restitution of the document. This case may be compared with *Murray v. Bisset*, 15th May 1810. Here a party, having failed to obtemper a sheriff's order to execute a deed in accordance with a decree-arbitral, it was held incompetent for the sheriff to enforce that order by imprisonment. In the latter case, summary incarceration was ordered by a sheriff in execution of his own decree, which is legally incompetent. In the former case, it was awarded in vindication of the Court's authority from contempt, a power necessarily inherent, and which

DISTINCTION
BETWEEN SUB-
MISSION AND
JUDICIAL RE-
REFERENCE.

1 D. 743.

Hume, p. 279.

F. C.

See *supra*, p.
398.

forms an important element in the proceedings under a judicial reference.

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REFEREE MUST
HEAR PARTIES.

The judicial referee owes the same duty to the parties as the Court, and he cannot effectually decide without hearing them. If he gives judgment without hearing them, the Court will remit the case to him, that the parties may be heard; *Lyle v. Neilson*, 15th June 1844. A judicial referee is entitled to a fee for his trouble; *Baxter v. Macarthur*, 1st June 1838; and, when a fee of reasonable amount is paid by a party, he is entitled to recover one-half of it from the other; *Edinburgh Oil Gas-Light Company v. Clyne's Trustees*, 6th February 1835; *Drummond v. Leslie*, 11th March 1835. Where expenses have been awarded by the referee, but without including any fee to himself, it is competent for the Court to award a fee to him, and subject one party in payment of it; *Yates v. Mitchell*, 7th June 1848.

See *supra*, p. 396.

6 D. 1163.

16 S. 1085.

13 S. 413.

13 S. 684.

10 D. 1233.

In England, when the submission by arbitration is by rule of Court, which is analogous to our judicial reference, and is of common occurrence, the conduct of the arbitrators and of the parties may be examined into, and if, on examination, it appears that the arbitrators have been partial and unjust, or have mistaken the law, the Court will not enforce performance of the award. It is not so, however, with us. That an award is iniquitous or contrary to law is no more an objection, when it is given under a judicial reference, than in a private submission. The judicial award is protected by the Act of Regulations 1695, as well as the decree-arbitral, and there is no distinction as regards the character of the objections required to overturn it. This was expressly ruled in the case of *Campbell v. Girvan*, 9th February 1843; and, in the appeal, *Mackenzie v. Girvan*, 9th March 1843, the statutory authority of the Act of Regulations will be found distinctly stated by Lord BROUGHAM to apply equally to judicial and extrajudicial awards; and the opinion of Lord CAMPBELL in the same case very forcibly exhibits not only the effect of the law of Scotland in receiving the decree-arbitral and judicial award as conclusive both as to law and fact, but also the superior advantages of this rule over the English practice, which subjects the arbitrator's judgment in various respects to the review of the Courts. The decision of the judicial referee cannot, therefore, be reviewed by the Judge upon any other grounds, than such as would be relevant to infer reduction of a decree-arbitral; *George v. Milne*, 4th February 1836. An ineffectual attempt to impugn a judicial award, on the ground of alleged miscarriage or misunderstanding on the part of the referee in dealing with the subject-matter, was made in *Brakinrig v. Menzies*, 17th December 1841; and, in *Wauchope v. Edinburgh and Dalkeith Railway Company*, 16th June 1846, a similar fruitless attempt was made to disturb an award,

GROUND OF
CHALLENGING
AWARD OF
REFEREES.

ACT OF REGU-
LATIONS.

See *supra*, pp. 396, 401-2.

5 D. 530.

v. 2 Bell's App. 43.

14 S. 404.

4 D. 274.

8 D. 816.

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14 S. 447.

upon the allegation that it was contrary to the provisions of a statute on the subject to which it referred; and in *Anderson v. Kinloch*, 6th February 1836, where it was alleged that the judicial referee had put a wrong construction upon the issues in the case referred, the power of the referee was thus illustrated by Lord MEDWYN:—"Even if the arbiter had put a wrong construction on the issues, this was a mere error in judgment to which a Judge presiding at a trial might have been equally liable. But there is this difference, that a Judge may be put right by a bill of exceptions, while an arbiter cannot be put right."

We have already seen, that the benefits derived from a stringent enforcement of awards in arbitration have been so clearly recognised in England as to form the express preamble or groundwork of a statute for giving further facilities for this mode of settling disputes; and, if this is felt even where the benefit exists in a degree comparatively limited, there is certainly much greater reason for congratulation in regard to the state of the law in Scotland, where the authority of the decree-arbitral and judicial award is firmly established and recognised as final and conclusive, excepting upon a few clearly-defined grounds of exception, involving a disregard of the fundamental principles of justice, and that we are thus exempt from the evils of litigation in examining the conduct of arbitrators and parties, and the conformity of awards with law and facts, evils which are felt and deplored in the sister country.

DEFINITION
AND EFFECTS
OF CONTRACT OF
COPARTNERY.

III. THE CONTRACT OF COPARTNERY.—The purpose of the contract of copartnery is to regulate the conditions upon which two or more persons agree to have a joint interest in the profit or loss of one trade or business, to be carried on for their common benefit. It is the joint interest in profit or loss, along with a partner or partners chosen for the purpose, which constitutes partnership. This conjunction creates in the eye of the law a separate *persona*, designated by the name which the partners adopt to distinguish their society; and that *Persona* is capable of contracting, of incurring liabilities for debt, and becoming the creditor of those who grant obligations in its favour. A partnership necessarily acts through the individual partners. It is by the act of one or more of them expressing the common will, that a bargain is made or a debt incurred; and, as each partner is responsible for the obligations thus undertaken, and his whole means liable for its fulfilment, and, as the public is entitled to presume, that the act of a partner in the partnership name is the act of the whole, it results, that, by entering into the society, each partner places his whole property at the disposal of his partners. Partnership is thus a contract of exuberant trust; and mutual confidence,

therefore, is its indispensable moral foundation. Now, as in every case the extent of possible abuse is proportionate to the degree of trust reposed, so it is very advisable, that the powers intended to be conferred by the partners on each other should be clearly defined, and their respective rights and liabilities fixed. This may not necessarily affect their position in relation to the public, but it supplies a rule which may be always appealed to for determining, whether each partner is acting within the limits prescribed by the agreement.

Writing is not necessary to constitute partnership. It may be proved by facts and circumstances, as in the case of *Livingston v. Gordon*, 17th January 1755, where, one of three partners having been discharged and the contract cancelled, the business was continued by the two others; and in a competition of creditors it was maintained, that the two thus trading without a contract did so as individuals, but the Court held them to be a company. For the causes already explained, however, it is generally expedient, that the terms and conditions of partnership should be fixed by contract.

CONSTITUTION
OF PARTNER-
SHIP.
M. 14,551.

The partners of a company must of course have a legal capacity to contract and bind themselves; so a pupil cannot effectually subject himself by a contract of copartnery, and, where a father engages a son in pupillarity as a partner, he has been held personally liable himself for the engagements of the company; *Macaulay v. Renny*, 15th February 1803. A decision to the same effect was pronounced in *Calder v. Downie*, 11th December 1811; but this case appears from the report to have been decided upon specialties, two of the Judges doubting the general doctrine, and I have not found any report of the discussion in the Court of Appeal, where the decision was affirmed, 14th April 1815. It is observed by Lord IVORY in *Macara v. Wilson*, 15th February 1848, that a wife, though possessed of separate funds, cannot validly bind herself as partner to her husband in a contract of partnership. A company cannot be constituted by one partner, a doctrine of great importance in determining the rights of creditors of a person trading under a firm; *Nairn v. Sir William Forbes & Co.*, 25th November 1795.

CAPACITY OF
PARTIES TO
ENTER INTO
CONTRACT OF
COPARTNERY.

2 Bell's Com.
624, note 5.
F. C.

10 D. 707.

2 Bell's Com.
625, note 1.

According to the doctrines ascertained in the first branch of our inquiries, the purpose of the contract must be such as the law permits. The case of *A. B. v. C. D.*, 12th May 1832, was formerly referred to as an example of a secret agreement between law-agents being disallowed, because calculated to prevent disinterested advice to clients.

PURPOSE OF
THE COPART-
NERY MUST BE
LEGAL.
10 S. 523.

The contract of copartnery ought to be completed with the statutory solemnities; but, though informal, it may be validated *rei interventu*; *Hay v. Sinclair*, 3d July 1800.

2 Bell's Com.,
646, note 3.

The points of chief importance to the Conveyancer we shall examine in the order in which they occur in the usual style of the contract; and we shall thus have the benefit of observing the legal principles

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which regulate this contract in the absence of conventional arrangement, at the same time that we ascertain in what manner the legal disposition may be controlled or modified by written agreement.

DEFINITION OF
THE BUSINESS.

(1.) *The Business, and the Name, of the Firm.*—The Conveyancer must define the trade or business which forms the subject of the partnership, and fix the company firm—that is, the social name by which the company is to be known, and to contract. By defining the business, the limits are established within which the partners empower each other to subject them in liability. This affords a clear rule *inter socios*, and it affords protection also against third parties, who shall deal with a partner in matters not falling within the business of the partnership. The effect of the principle in controlling the acts of partners in questions among themselves has of late been strongly exemplified in cases, where it has been held incompetent for one railway company, without special power, to invest any part of its funds in the stock of another railway company, and such misapplication may be challenged by any one partner; *Balfour's Trustees v. Edinburgh and Northern Railway*, 8th June 1848.

10 D. 1240.

SUBSCRIPTION
BY NAME OF
THE FIRM.

Every partner has an implied power of binding the company by subscription of its firm. This is a power inherent in partnership, and of which, as regards the public, no prohibition or renunciation in a private contract can strip a partner, because third parties have no notice of it. When a partner, therefore, accepts a bill, or otherwise contracts a debt, by the social firm in the line of the company's business, or of such a kind that the contracting party may reasonably presume it to be for a company purpose, he thereby binds all the other partners; *Dewar v. Miller*, 14th June 1766. Here £160 was borrowed by the acting partner of a company in the linen trade, and he granted the company's acceptance for the amount. Lord KAMES, as Ordinary, found the other partners not liable, because the managing partner was not empowered by the contract to borrow money, and all the other bills he had accepted were for goods purchased. The Court, however, held the partners liable. In *The British Linen Co. v. Alexander*, 14th January 1853, it having been part of the design of a partnership to raise money for its objects, one partner was not permitted to avoid liability for a bill discounted by another for the purposes of the joint adventure, on the plea that he did not sign the bill. The liability of partners could scarcely be illustrated more strongly than by the case of *Watson v. Smith*, 17th December 1806. Here a lad, just major, upon the solicitation of a brother, signed a contract of copartnery. He never acted as a partner, and received no benefit; the contract was not in any way made public, and it was alleged to have been destroyed within a few weeks after execution. Yet he was subjected in payment of an acceptance under the company firm, granted to a party who did not know of the contract or

M. 14,569.

15 D. 277.

Hume, 756.

that he was a partner when he transacted with the brother. Thus it is evident that, although a party acts fraudulently, yet, if the fraudulent transaction be in the line of the company's business, his partners are bound by it. But where, on the other hand, the company firm is used to create obligations in matters manifestly different from the company's trade, the parties accepting such obligations are held not warranted, in the absence of special consent by the partners, to presume that they have authorized a liability not contemplated by their contract ; and, in such circumstances, the company's signature gives no recourse against partners, without whose knowledge it has been used. Thus, in *M'Nair & Co. v. Gray, Hunter, & Speirs*, 19th June 1803, the managing partner having subscribed with the company firm a guarantee for the price of sugar and molasses furnished to his mother, these being articles in which the company did not deal, it was held, that the party furnishing the goods, not being entitled to presume that they were to be applied for behoof of the company, was not *in bonâ fide* to act upon the guarantee, in so far as it might affect the other partners. Upon the same principle, where an individual partner grants the obligation of the partnership for his private debt, the other partners are not bound to the creditor accepting of such obligation in the knowledge of the circumstances ; *Clarke v. Shepherd*, 30th November 1821. Connivance or fraud on the part of the receiver will of course strengthen the objection ; and, in *Kennedy*, 22d December 1814, there is an example of the combined objections successfully pleaded, viz. that the description of the value on the face of the bill was false, and that the goods fraudulently specified were not in the line of the company's business. It is a qualification of this doctrine, that, if the company have notice of the act done by a partner out of the line of business, they must disclaim it, otherwise they will be held liable. Accordingly, in the case of *Proprietors of Bo'ness Canal v. M'Alpine, Fleming, & Co.*, 23d June 1791, the partner of a manufacturing company having subscribed for two shares of canal stock, his copartners were held to be precluded from questioning their liability, by the circumstances that the company was named as a proprietor in the incorporating Act of Parliament of which they had received a copy, and that receipts for the calls were granted to the company, and the payments entered in their books. As an individual partner may not step out of the line of the company's business, so he cannot perform any act of an extraordinary description, such as cannot be presumed to have been in the view of the partners, when, by the act of copartnery, they committed implied powers to each other. A partner, therefore, cannot effectually bind a company to submit a claim to arbitration, that being an extraordinary act ; *Lumsden v. Gordon*, November 1728. In England it is settled that a power of attorney cannot be granted by a com-

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USE OF NAME
OF FIRM IN
MATTERS OUT OF
LINE OF BUSI-
NESS.

Hume, 753.

1 S. 179.

F. C.

Hume, 751.

M. 14,567.

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F. C.

8 Dow's App.
160.TITLE TO SUE
AND DEFEND.INDIVIDUAL
PARTNERS
LIABLE *sub-*
sidiarie.

F. C.

9 S. 487.

11 D. 179.

COMPANY NOT
LIABLE FOR
PARTNER'S PRI-
VATE OBLIGA-
TIONS.

3 D. 324.

pany without the consent of all the members ; and upon principle it appears probable, that the same would be held in Scotland, the appointment of an attorney being virtually a delegation of the company's powers as regards the particular matter referred to. It results also from the nature of the legal *persona* created by partnership, that a company firm cannot be used to pursue a criminal complaint, the right to pursue criminally being founded on the sense of injury, a feeling which an impersonal pursuer cannot be presumed to entertain ; *Aitken v. Rennie*, 11th December 1810 ; and, where an individual partner pursues a criminal complaint in relation to company property, the company cannot be sued for damages on the grounds of malicious prosecution and wrongous imprisonment ; *Arbuckle v. Taylor*, 1st May 1815.

Before the partners can be subjected individually, the debt must be constituted against the company ; but, after it is so constituted, an individual partner may be sued for payment without calling the company ; *M'Tavish v. Lady Saltoun*, 3d February 1821. When it is necessary to constitute the debt against the company, if it be dissolved and bankrupt, all the partners must be called ; *Dewar v. Munnoch*, 23d February 1831, with the authorities there cited. In such actions each defender must be individually amenable to the jurisdiction of the Court to which he is cited, the domicile of the company not being sufficient to subject him when his residence is in another jurisdiction. One of the purposes served by fixing the company firm is, that a name is thus provided by which the society may sue its debtors, a mercantile company with a proper firm being entitled to sue by that firm, according to decisions cited in treating of the enforcement of obligations. A joint-stock company with a descriptive firm may sue in the name of the firm and of three individual partners, or of a manager specially authorized in the contract of copartnery ; and, by 7 Geo. IV. cap. 67, banking companies in Scotland, which comply with the regulations of that statute, are entitled to sue by their manager, cashier, or other principal officer. All these points concur in *National Exchange Company of Glasgow v. Drew & Dick*, 5th December 1848.

While the company is liable for obligations granted by an individual partner in the line of its business, it is not liable, on the other hand, for obligations undertaken by the partner in his own name, and in which he is the proper debtor, although such obligations may be connected with the company's business and in *rem versum* of the company. Thus, where a partner agreed to erect buildings for the company, and made a separate contract with a bricklayer for part of the work necessary to implement that agreement, upon the partner's insolvency the bricklayer was found to have no claim against the company ; *White v. M'Intyre*, 12th January 1841. If a partner

shall employ the funds and credit of the company, though it may be unwarrantably, in a separate adventure, the company is entitled to the profit which may accrue ; *Wallace, Hamilton, & Co. v. Campbell*, 8th June 1821 ; and, in general, it is presumed that a partner, acquiring a right connected with the company's business, makes such acquisition on behalf of the company, the law requiring with great jealousy that no one partner shall profit at the expense of the rest, and that he shall not even place himself under circumstances of temptation to do so.

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1 S. 53 ;
2 Shaw's App.
467.

(2.) *Endurance of the contract.*—The next point is, How long is the partnership to last ? Mutual confidence is an element so essential in partnership, that, where no period of endurance is fixed, the contract may be terminated at the pleasure of any partner without cause assigned, and with this qualification only, that, in order to prevent claims of damages, he must give reasonable notice ; *Marshall v. Marshall*, 26th January 1815. From the *delectus personæ* involved in this contract it results, also, that the death of a partner terminates it, unless the contrary be provided.

TERMINATION
OF CONTRACT BY
CONSENT ;

BY DEATH ;

These sources of uncertainty to the continuance of the partnership are obviated by an express provision, that it shall endure for a specified time. If the period so specified be truly a limited time, the obligation is effectual, although it may exceed the probable duration of the parties' lives, and it will be binding upon their representatives. It was so decided in regard to a contract for 124 years ; *Warner v. Cunninghame*, 24th January 1798, affirmed 24th February 1815. But even when a period has been fixed, a partner, and especially a majority of partners, may dissolve before the term has arrived, upon shewing reasonable cause ; *Barr v. Speirs*, 18th May 1802, noted by Mr. Bell, where two of three partners were found entitled to dissolve before the expiration of the contract, on the ground of greater advances than were contemplated being required, and the eventual benefit being doubtful. Our Courts, however, will not exercise this power without clear grounds, and it may be held generally that they will interfere with reluctance. This is the rule in England, where this contract has been compared by an eminent Judge to that of marriage, since the parties to each take one another for better or for worse, and must not at every turn call upon the law to rectify the consequence of their own want of foresight.

WHERE ENDUR-
ANCE SPECIFIED
IN CONTRACT.

M. 14,608.
3 Dow's App.
76.
Ersk. Inst. iii.
3, 26.
2 Com. 633,
note, 2.

In the case of the *Glasgow Church Building Society*, improbability or difficulty of attaining a purpose was held not to be a relevant ground to dissolve a society for a public object ; and it was laid down, that, to justify the dissolution, impossibility of accomplishment must be shewn ; *Bain v. Black*, 22d February 1849.

6 Bell's App.
317.

The legal effect of a fixed period of endurance may be controlled

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by a special provision in the contract, empowering any partner named to retire at a time which may be specified, upon giving such previous notice as may be agreed upon.

CONTRIBUTION
OF STOCK BY
PARTNERS.

(3.) *Capital Stock*.—The capital stock is the amount of value provided in money or otherwise to carry on the joint business. By fixing its amount the sum is determined which in ordinary circumstances the company can require each partner to contribute. This, however, is merely a private arrangement among the partners themselves, for no provision in their contract can limit their liability to the public; and, when it becomes necessary for the company to obtain a contribution from the partners over and above their shares of the stock prescribed by the contract, such further contribution can be enforced; *Douglas, Heron, & Co. v. Hair*, 24th July 1773. Here a loss of £70,000 beyond the amount of the subscribed capital having been incurred, the partners were held liable to make it up upon a call by the company.*

M. 14,605.

It is only in order to make good the liabilities of the company to third parties, that a partner can be required to contribute more than his share of the capital stock agreed upon. When the capital is fixed by the contract, that is a fundamental condition of the partnership, and the amount cannot be increased without the consent of every partner. A reserved power to a certain number of partners to alter the articles of copartnery gives no authority to such parties to increase the capital. This was held by a majority of the whole Court in the case of a joint-stock company; *Monro v. Edinburgh Cemetery Company*, 5th February 1851. In the subsequent case of *Sturrock v. Thom's Executors*, 21st February 1851, a different decision was pronounced, but expressly on the ground that the defender had acquiesced in increasing the stock.

13 D. 595.

13 D. 762.

Not only the aggregate capital must be stated, but, if it is not to be contributed equally, the proportion of each partner must be specified, otherwise they will be liable equally.

(4.) *Division of Profits*.—Another purpose served by setting forth

17 D. 461.

* In *Buchanan v. West of Scotland Malleable Iron Company*, 21st February 1855, an action, raised at the instance of a dissolved joint-stock company and of the ordinary directors thereof, as directors and as individuals, against a partner, and concluding for payment of certain sums over and above the subscribed capital to be applied to meet the liabilities of the company, was held competent and relevant under the terms of the contract of copartnery. The Judges recognised the authority of Mr. Bell's *dictum*, that "partnership subsists after the dissolution for the purpose of winding up the concern;" and an opinion was expressed, that, where the contract does not devolve the duty of winding up upon certain parties, action for realizing the company claims may competently be sued at the instance of the company, which continues a separate *persona* in law for that purpose, notwithstanding its dissolution, which is in so far as the power of contracting new obligations is concerned.

2 Com. 637.

the proportions of capital stock is to determine, in the absence of other means of ascertaining, the mode in which the profits are to be divided, the legal presumption being, where the shares are not expressed, that they are to be proportional to the capital contributed. That is the legal presumption; but a partner's share is not necessarily proportionate to his input capital, if he can shew grounds for claiming a larger share, as in the case of *Struthers v. Barr*, 19th May 1826, where, although one partner's share of stock was smaller than those of the others, the House of Lords held, upon the history of the partnership, that he was entitled to an equal share of the profits. When neither the stock nor the profits are specified, it is held by Erskine, that both are to be presumed equal, unless the contrary be proved,—a doctrine illustrated by *M'Whirter v. Guthrie*, 14th February 1822, where one of two writers in partnership having claimed an extra allowance, on the ground that he did the greater part of the work, the Court, in the absence of any condition to that effect, disallowed the claim, and held the shares to be equal. The case of *Fergusson v. Graham*, 3d June 1836, shews the application of the same principle. But, in following out this rule, it is carefully to be noted, that equality is not to be taken for granted from the mere silence of the contract. That was the rule of the Civil Law, but it does not hold in the Laws of Scotland or England. With us the silence of the contract not only does not preclude other evidence, but is a ground for resorting to it, and, when it can be shewn by other evidence that the intention of parties was different, the presumption of equal shares will yield to such evidence. This doctrine was strongly declared by the House of Lords, 14th February 1831, in reversing *Campbell's Trustees v. Thomson*, 26th May 1829. Here there being no conclusive written evidence, the Court of Session found, "that the presumption of law is, "that there was to be an equal participation," but the House of Lords remitted with instructions to have the point of fact ascertained by a jury.

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LEGAL PRESUMPTIONS AS TO SHARES OF PROFITS.

2 Wil. & Sh. App. 153.
Inst. iii. 3, 19.
1 S. 319.
14 S. 871.
5 Wil. & Sh. App. 16.
7 S. 650.

A partner may have a share of the profits, and yet not be subject to loss arising from the business; and this state of relations may be inferred from circumstances and the conduct of the parties, notwithstanding expressions in the contract, tending apparently to a different conclusion. So it was held in the case of *Geddes v. Wallace*, 24th July 1820, reversing the judgment of the Court of Session. Here the manager of a company with a salary and a share of profits corresponding to a nominal interest in the capital stock created for the purpose of regulating his share of profits, was found not to be liable in accounting with his partners for a share in the company's losses. But such exemption from loss holds only in questions *inter socios*, the partner enjoying the exemption being liable to strangers as fully as if he had no such exemption. The cases to which we have referred

PARTNER, WHERE EXEMPT FROM LOSS.
2 Bligh's App. 270.

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INTEREST IN
PROFITS DOES
NOT NECESSA-
RILY INFER
RESPONSIBILI-
TIES OF PART-
NERSHIP.
1 D. 659.

teach very impressively the necessity of perfect explicitness in defining the shares both of the capital stock and of the profits, so as to exclude ambiguity and risk of question.

Before leaving this point, we may notice the case of *Venables v. Wood*, 8th March 1839, where it was held, that one may have an interest in the profits of an undertaking, without being subject to the loss. Here the exempted party permitted those with whom he contracted to publish a book, on condition of their undertaking the whole expense, responsibility, and trouble, and that the author should suffer no loss, and be paid by a portion of the profits. This was held to be a sale of the author's labour, and not a partnership. The case, however, was very peculiar, and the practitioner must not be the less mindful of the general rule which attaches responsibility for loss to participation in profit.

A partner is a creditor of the company for what he contributes to its funds beyond his stipulated portion of capital; and, where such superadvances were made, so as not to be revocable at the partner's pleasure, it was held before the recent statute regulating interest not to be usurious to stipulate for larger than the legal rate of five per cent.; *Finlayson v. Rutherford*, 22d January 1830.

8 S. 374.

(5.) *Rights and liabilities of partners.*—The rights and liabilities of partners during the subsistence of the contract, are such as arise from its nature and objects. It is usual to bind one or more of them to devote their whole time and attention to the business of the company, and, when it is intended that a partner shall not have it in his power to engage in other undertakings, there ought to be a stipulation to that effect. As the parties are presumed to have formed their judgment of each other's qualifications for business before entering into the contract, there can be no claim or liability for deficiency on that score.

POWER TO AS-
SIGN INTEREST
IN COPARTNERY.

The principle of *delectus personæ* excludes any partner from the power of substituting a person in his room; but he may be enabled to do so by a stipulation in the contract, that he shall be entitled to assign. When the power to assign is coupled with a right of pre-emption to the company, that condition must be fairly implemented; and, where it was stipulated that a written offer should be made to the company, verbal communings were held not to supply its place, and a sale without a written offer was found ineffectual; *Gibson-Craig v. Aitken*, 2d February 1848.

10 D. 576.

The property of the partnership does not belong in separate shares to the individual partners, but is vested in the company as a separate *persona*. This rule holds even in regard to heritable estates held or purchased on account of the company. By the rules of the Feudal Law, heritable subjects cannot be vested in a company; and, when

acquired for a partnership, they are usually held by one or more partners as trustees. Still they are company property; and, since they become divisible among the individual partners at the dissolution of the partnership, they are moveable as regards succession; *Minto v. Kirkpatrick*, 23d May 1833; *Irvine v. Irvine*, 15th July 1851. PART II.
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COMPANY PROPERTY.
11 S. 632.
13 D. 1367.

This is another example of the flexible meaning of the term "*heir*" adapting itself to the nature of the property. As the partnership property belongs to the company, no partner can withdraw any portion of it for his own use, until the company makes a division; and this is usually provided for by a clause directing the profit or loss to be apportioned at the annual balance.

We have found, that the diligence of poinding is not applicable to joint property. A partner's share of the company stock cannot, therefore, be poinded. But the creditor of a partner may use arrestment in the hands of the company, which will affect any dividend or sum instantly payable to him, and also his share of the stock as at the date of the arrestment, to be made furthcoming when the company is dissolved. This point was carefully considered and settled, as now stated, in *Neilson v. Rae*, 19th November 1742. Again, the legal character of the company as a separate *persona* is strikingly illustrated by this, that money owing to it by one of the individual partners may be arrested in his hands by a creditor of the company. This was decided for the first time by the whole Court in *Hill v. College of Glasgow*, 13th November 1849, instalments of capital stock called up, but not paid, being held subject to arrestment in the hands of individual partners of a railway company. COMPANY PROPERTY, HOW ATTACHED. 11
M. 14,564.
12 D. 46.

6. *Dissolution of Copartnery*.—This contract, we have seen, is dissolved by the death of one of the partners, or by his renunciation when there is no term fixed. The bankruptcy of a partner does not of itself necessarily effect a dissolution. Lord IVORY, in his note to Erskine, holds it rather to be a ground upon which dissolution may reasonably be required by the copartners; and, in *Paterson v. Grant*, 12th July 1749, an insolvent partner, though unable to contribute to loss upon the business, was found entitled to continue participation in the profits. But sequestration, or a trust-conveyance, which divests the bankrupt partner of his property, necessarily creates a dissolution. EFFECT OF PARTNER'S BANKRUPTCY.
Inst. iii. 3, 26.
M. 14,578.

The immediate effect of the dissolution, when the parties' rights under it are left to the operation of the law, is, that all the partnership property which is incapable of division, and as to the disposal of which the parties cannot agree, must be sold by public auction. It was so found in regard to the lease of a shop, after ascertaining by the report of tradesmen, that the premises were not divisible; *Mar-* EFFECT OF DISSOLUTION.
F. C.

- PART II.** *shall v. Marshall*, 23d February 1816 ; and, where the remaining partners in a newspaper refused to purchase the copyright or goodwill, it was allowed to be sold by auction without their consent ; *M'Cormick v. M'Cubbin*, 4th July 1822. In order to the winding-up of the company's affairs, the retiring partner, or the representatives of the deceased partner, are entitled to have access to the company's books ; *Macgregor v. Macgregor*, 8th July 1823. The affairs are finally closed by dividing among the partners the goods or funds ultimately realized, or by apportioning among them the loss which results after satisfaction of all the company's liabilities, for which, as we have seen in the case of *Douglas, Heron, & Co.*, the partners are liable rateably according to their shares.
- CHAPTER VI.** **WINDING-UP BY JUDICIAL FACTOR.** When all the partners are dead, and it can be shewn after the dissolution, that there is great risk of confusion and loss, the Court will interpose by the appointment of a judicial factor to wind up the affairs ; *Dixon v. Dixons*, 22d December 1831, affirmed 13th August 1832.
- 10 S. 178 ; 6 Wil. & Sh. App. 229.** **NOTICE OF DISSOLUTION.** As regards liability to third parties, when the dissolution is occasioned by death, the party's decease is a public fact, and all men are bound to know it ; *Christie v. Royal Bank of Scotland*, 17th May 1839 ; and Lord Chancellor ELDON held, that a deceased partner's estate was not liable for the subsequent obligations of a partner continuing the business, although no notice of the dissolution by death were given. See also *Aytoun v. Dundee Banking Co.*, 19th July 1844. But, when the dissolution arises from the retirement of a partner, he remains responsible to all third parties not certiorated of the fact of his retirement, upon the principle that, after credit has been established by the association of certain individuals under a firm or name, the public is entitled without renewed inquiry to rest in the assurance, that the same individuals remain bound, until the separation of any one is notified, and the identity of the firm thereby destroyed.
- 1 D. 745.** **Ersk. Inst. iii. 3, § 26, note, 128.** **6 D. 1409.** This principle is exemplified in the case of *Dalgleish and Fleming v. Sorley*, 24th May 1791, where one who had been partner of a company one year was held liable for a debt contracted after the dissolution, for want of notice. Notice of dissolution is generally made by advertisement ; and this is sufficient, when the advertisement is traced into the hands of the party claiming ; *Bertram v. M'Intosh*, 13th February 1822. But advertisement is unavailing unless it be brought home to the creditor's knowledge ; *Sawers v. Tradestown Victualling Society*, 24th February 1815. This rule applies not only to those who have openly acted as partners, but to secret and dormant partners also, who cannot be relieved without notice ; *Hay v. Mair*, (or *Kay v. Pollock*.) 27th January 1809. It is equivalent to notice, if the firm under which the business is continued be obviously and distinctly changed, as that leaves no room for presuming that the company
- M. 14,605.**
- 1 S. 461.**
- F. C., and 1 S. 541.**
- F. C. ; 1 Sh. Digest, 809.**

remains unaltered ; *Dunbar v. Remington, Wilson, & Co.*, 10th March 1810. Notice liberates, of course, only from subsequent obligations ; and a retiring partner cannot be liberated from those existing at the date of his retirement, otherwise than by payment to the creditors ; *Ramsay's Executors v. Grahame*, 18th January 1814 ; *Milliken v. Love* ; *and Crawford*, 23d February 1803. In the latter case, the retiring partner had left in the hands of the others sufficient funds to pay the debts, and the creditors had received the interest from the new company created after the retirement ; but this was not held to infer any relinquishment of his claim against the retiring partners, who were subjected in payment of the debt six years afterwards. A deceased or retiring partner is effectually liberated, however, if the creditor discharge the old company, and take the obligation of the new one ; *Ker v. M'Kechnie*, 22d February 1845. This is one of the cases in which intimation is required, not as matter of solemnity, but for information only, and it was held in the case of *Aytoun*, already referred to, that private knowledge is equivalent to intimation.

It is impossible to defeat the rights which arise to third parties upon a dissolution, by any provisions in a contract of copartnery, but arrangements may be made to obviate the difficulty and inconvenience which result to the partners themselves, when their legal rights are not controlled. With this view it is stipulated, that, at the dissolution, the books shall be brought to a balance, the effects inventoried, and a complete state of affairs made up and docqueted. This is a security against dispute, or confusion in the accounts. Then, in the event of the property of the company being insufficient, or not soon enough realizable, for liquidation of the company's obligations, the partners bind themselves to pay by instalments corresponding to their shares a sufficient sum to meet the engagements. In case of delay or refusal by a partner to concur in these steps, an accountant is named to make up a state of affairs, and it is agreed that his statement shall, along with an extract of the contract, be a sufficient warrant for diligence. Then, in order to obviate the risk that, after the dissolution, the partners may not be able to agree in the appointment of one of themselves, or of another, to wind up the affairs, a person may be named for that purpose in the contract, substituting several others successively, in case those first named may die or refuse to act ; and, to make this nomination effectual, the property which shall belong to the company at the dissolution is disposed and assigned to the parties so named in their order, with power to recover and apply the same in terms of the contract, with a declaration, that the putting of an extract into the hands of any one of them in their order, shall be sufficient delivery. In order that any partner may have it in his power to prevent indefinite delay in the settlement of the company affairs, a provision is usually inserted, that, if at the expiry of twelve months, or at

PART II.
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F. C.
F. C.
Hume, 754.
7 D. 494.
6 D. 1409.
SPECIAL STIPULATIONS WITH REGARD TO DISSOLUTION OF COPARTNERY.

PART II.
CHAPTER VI.
SPECIAL STIPU-
LATIONS WITH
REGARD TO DIS-
SOLUTION, *contd.*

any other fixed period agreed upon, any part of the company's debts or goods shall remain unrecovered or not disposed of, any partner shall have it in his power to offer to sell his proportion thereof at a price to be paid immediately, or by instalments with security; and if such offer shall be refused, or not accepted within a limited time, then the offerer shall be entitled to purchase the other partners' proportions upon the same terms. This arrangement will also obviate the necessity of a sale by auction. There is generally a separate provision for the case of dissolution by death. It will generally be an object with the survivors to continue the business; and it is, therefore, desirable to make this practicable with as little of disturbance as possible to the arrangements existing at the period of the death. It is, therefore, provided that a balance shall be made, and inventories taken, and that the surviving partner or partners shall be entitled to purchase the deceased's share of the stock at a certain rate in proportion to a fixed rule of valuation, which may be the prime cost, or the estimate made at last balance, the price being paid either immediately or by instalments secured by caution. In order to obviate the trouble and inconvenience of a new balance, (within a short time, it may be, of the ordinary annual balance,) it is sometimes agreed (and this is an excellent practical expedient) to dispense with a balance, and to provide that the deceasing partner's share of profits for the period between the last annual ascertainment and his death shall be at the same rate in proportion to the time, as the amount of his share then ascertained.

GENERAL TERMS
OF CONTRACT.

General Terms of Contract of Copartnery.—The other portions of the deed in its usual form are explained by the principles which we have found regulating this contract in its uncontrolled form. It commences with an agreement to be partners in carrying on a joint trade or business, which is specified, in a place named, under a firm also named, and for a fixed term of years. Each of the partners engages not to carry on any other business without his partner's consent, but to devote his whole time and attention to the company's concerns. Then, there may be a power to any partner, upon due notice, to withdraw at a fixed date before the end of the copartnery. The amount of capital is next fixed, with the proportion to be paid by each partner. It is agreed, that inventories of the company's property shall be made up and subscribed—which is important, in order to preserve clear evidence of the company's effects. It is next agreed, that all contracts and writings shall be signed by the firm. Then, there is an engagement to keep regular books, containing all the company's transactions, besides a letter-book, and to balance the books at least once a year upon a specified day, when the profit or loss shall be divided. There is an obligation upon the partners, each to repay his share of whatever may be advanced by any other partner beyond his

proportion of the capital stock. There may also be stipulations regulating the absence of either partner upon the company's business, and the departments which they are respectively to manage. It is not uncommon for a contract of copartnery to contain a lease of premises, belonging to one partner, for the use of the company. After the provisions in case of dissolution, which have already been described, there is usually inserted a clause submitting all differences which may arise to an arbiter, who, as we have already found, must be named and designed individually, in order to make the reference effectual, since this is a submission of *anticipated disputes*. Here, also, it is prudent to substitute other arbiters in case of failure or non-acceptance. This submission will be effectual only as regards such differences as the parties can be held to have had in contemplation. An attempt by a partner to terminate the copartnery, by taking wrongous proceedings with a view to procuring sequestration, is not a difference in the sense of this clause, and the jurisdiction of the Court upon such a question is not, therefore, excluded by the clause of reference; *Lauder v. Wingate*, 9th March 1852. The deed concludes with the penalty for non-performance, and a consent to registration of the contract, and of any decree-arbitral which may follow upon it, for execution.

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TERMS OF CONTRACT, CONS^d.

14 D. 633.

NOTE.—The common-law rules in regard to partnership have been greatly altered and modified by the recent "Joint-Stock Companies' Act," 19 & 20 Vict. cap. 47. The chief provisions of that Statute will be found in the APPENDIX.

IV. THE CONTRACT OF MARRIAGE.—In order to understand clearly the object and effect of the usual provisions of the marriage-contract, it is necessary to keep in view, what dispositions the law makes by its own authority, in relation to the property of those who form this society. If the legal effects were in all cases those best suited to the adjustment of eventual rights, there would be no occasion for conventional provisions, since it is the object of these to control, and, it may be, to counteract the results which the law, by its own rules, would produce. Without knowing, therefore, the legal disposal of property subject to the relation of marriage, it is impossible to have any accurate perception of the design and meaning of the marriage-contract.

EFFECT OF
MARRIAGE
WITHOUT
CONTRACT.

The fundamental principle, by which the rights now referred to are regulated, is, that all the members of the society created by marriage have an interest in the common property. That property consists of whatever belongs to the contracting parties; and the members of the society are these parties themselves, and the children who may spring

COMMUNION OF
GOODS.

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CHAPTER VI.

COMMUNION OF
GOODS, *contd.*

from the union. The principles of the feudal system do not permit the feudal relation to be disturbed by an entire subjection of the heritable property to the social interests ; and, therefore, the husband or wife does not cease to have the exclusive right to the heritage which either of them possesses or may acquire ; and the same system, by the law of primogeniture, gives precedence in the inheritance of such property to the eldest son. But, with regard to the rents of heritage accruing during the marriage, and generally, to all property of a moveable nature—embracing corporeal moveables, and money not invested in bonds bearing annual-rent—with regard to these, the law produces an interest called *the communion of goods*, comprising everything belonging to the husband and wife of a simple moveable nature, which become subject to certain legal rights and claims on behalf of every member of the family. In order to bring any fund within the communion of goods, it must have existed and been possessed, as an existing vested interest, during the marriage. The contents of a policy of insurance, made by a husband upon his wife's life, and payable six months after her death, do not, therefore, fall under the communion, and the wife's next of kin were not allowed to participate in such a policy, in *Wight v. Brown*, 27th January 1849.

11 D. 459.

Jus Mariti, AND
RIGHT OF AD-
MINISTRATION.

But, although this fund is affected by common interests, it is, during the marriage, under the absolute control and administration of the husband, and the surrender or abatement of the wife's rights is so complete, as to operate in law as an assignation by her, insomuch that the goods in communion, though comprehending her property, can be attached for her husband's debts. His right embraces the rents and annual profits of her heritable subjects, and extends also to such moveable property as she shall acquire during the marriage. On the other hand, the husband becomes liable for his wife's debts of a like nature with the rights falling under the communion, although these may exceed the amount of her property assigned by the marriage ; and this liability continues until the dissolution of the marriage. But, although the joint property thus becomes virtually the husband's, and may be expended or disposed of by him during the subsistence of the marriage, the law does not forget that it is truly a communion, and the wife's rights re-emerge in a distinct form when the marriage is dissolved.*

18 Vict. c. 23.

* The recent Intestacy Act, 18 Vict. cap. 23, has operated an important change in the rules of law laid down in the text ; and the results, which, in certain cases, may follow from the absence of a contract of marriage, are not now so inconvenient and inequitable as they were before the passing of that Statute ; (25th May 1855.) The text, therefore, falls to be corrected with reference to the provisions in sections 6 and 7 of the Act. By the former section it is enacted, that, "where a wife shall *predecease her husband*, the next of kin, executors, "or other representatives of such wife, whether testate or intestate, shall have no right to "any share of the goods in communion, nor shall any legacy, or bequest, or testamentary "disposition thereof by such wife, affect or attach to said goods or any portion thereof."

The effect of dissolution is different according to the length of time during which the marriage has subsisted; and it is also affected by the fact of there being, or not being, issue.* If it is dissolved by the death of either party within year and day, (which means before a full year, for if any part of the day-after have elapsed, then there has been subsistence for year and day,) and without a living child, then matters return into their previous position, the wife's property reverting to herself or her heirs without burden or claim in favour of the husband or his representatives, and the husband's property, in like manner, returning to him or his heirs free of any liability to the wife or her next of kin. But, if there be a living child, (that is, a child heard to cry,) then, although the marriage dissolve within year and day, certain legal rights arise; and such rights are created also by the endurance of the marriage beyond a year and day, whether there be issue or not. These legal rights are the following, viz. :—

When there is no issue, the goods in communion divide into two equal parts, one belonging to the surviving spouse, and the other to the deceased's next of kin.* When there is issue, if the wife predecease, the division is into three parts,* of which the children take one as their mother's next of kin, and the remaining two continue with the father, the one in his own right, and the other in his character of administrator-in-law for his children, but under his absolute control. If the father predecease, the division is tripartite, one share going to the widow *jure relicte*—another to the children under name of legitim—(that is, their lawful share, called also "portion natural," and "bairns' part of gear,")—and the third, which is called the "dead's part," going also to the children as their father's next of kin. It is only to the legitim, that the children have an absolute right. To the dead's part, and that falling under the *jus relicte*, they succeed as the heirs *in mobilibus* of their parents, who may, accordingly, dispose of these portions as they shall respectively think fit. Such is the legal apportionment of the goods in communion upon dissolution of marriage, and, in certain circumstances, it may be productive of results highly inconvenient and inequitable—as, in the case of either party possessing large personal property, if the marriage shall be dissolved after year and day and without issue, the next of kin of the other party, who may have contributed nothing to the goods in communion, will, notwithstanding, be entitled to receive one-half of the property, however extensive.*

It is thus evident, that no part of a practitioner's duties is more

Section 7 enacts, that, "where a marriage shall be dissolved before the lapse of a year and day from its date, by the death of one of the spouses, the whole rights of the survivor and of the representatives of the predeceaser shall be the same as if the marriage had subsisted for the period aforesaid."

* See *supra*, note, p. 422.

PART II. important, than the preparation of instruments, whereby these effects
CHAPTER VI. of the rules of law may be controlled or prevented.

A contract of marriage may be made either before marriage or after it; but the effect of such a deed made after marriage is much more limited than when it has been executed before.

THE ANTENUPTIAL CONTRACT. 1. *Antenuptial Contracts of Marriage*.—The provisions of the antenuptial contract as regards the moveable property of the parties, to which our view is at present confined, are directed to four leading objects, viz :—

To make settlements upon the wife, and to regulate her rights.

To settle a provision upon the children, and to limit their legal claims.

To settle the rights of the husband and children in relation to the wife's property.

To make these arrangements effectual, notwithstanding a premature dissolution of the marriage.

We shall review these points in their order :—

PROVISION TO
WIDOW BY BOND
OF ANNUITY.

(1.) *Settlements upon the Wife*.—The purpose of these is to provide for her maintenance after the dissolution of the marriage, in case she shall be the survivor; and this may be done in various ways. The other contracting party may bind himself to pay her an annuity of a specified amount in the event of her survivance, to commence at the first term after his death, and be payable half yearly afterwards during her life. Reference may be made to our examination of the bond of annuity, and it is unnecessary to repeat its terms. When the widow will have right to an annuity or allowance from any fund to which the husband is a contributor, it should be stated, whether the amount provided in the contract is or is not inclusive of such separate annuity.

LIFERENT OF
SUM IN FAVOUR
OF WIDOW.

The wife's provision may be made by the husband binding himself to lay out a specified sum, of which she is to enjoy the liferent—that is, the interest or annual proceeds during her life.

PROVISION OF
CONQUEST IN
FAVOUR OF
WIDOW.

Or she may be provided in the liferent of the whole or a part of the conquest—that is, of the property which the husband shall acquire during the subsistence of the marriage. Conquest includes only such property as one acquires by his own industry, or by singular titles; and in moveables, it does not include what he succeeds to as executor of a person deceased, or what he gets by legacy, or by his *jus mariti*. In order that there may be a basis for computing the amount of the conquest, it is prudent, when settlements are made out of it, to set forth the precise amount of the husband's fortune at the date of the marriage. The mode of accounting, when provisions are made out of the conquest, formed the subject of discussion in *Hunter's Trustees v.*

Ersk. Inst. iii.
8. 43.

1 D. 817.

Macan, 25th May 1839, where it was decided, that an annuity to a widow, not charged upon the conquest, is to be reckoned a burden, not upon it, but upon the husband's previous estate. PART II.
CHAPTER VI.

If it is intended to restrict the widow's annuity or other provisions in the event of her entering into a second marriage, that must be specially stipulated, for otherwise the law will authorize no diminution upon that ground.

Any one of the modes of provision which have been specified may be settled by itself, or in combination with one or both of the others; and it is common, in addition to the principal provision by annuity or liferent, to settle upon the wife the furniture which shall belong to the husband at his death, or, at her option, a specified sum of money in lieu of furniture. A liferent of furniture is sometimes given, but, as a general rule, that is not an eligible arrangement, because the eventual interest of those who have right to the fee of the furniture may lead to inconvenient and troublesome interference and questions. In *Campbell v. Stewart*, 13th June 1848, an attempt was made to vest the fee of the husband's furniture in the wife during the marriage. According to the terms of the conveyance the wife had no independent power of sale, and her right was to cease, if she should enter into a second marriage. On these grounds, the possession remaining with the husband, there was held to be no transference, and that the furniture was liable to the diligence of the husband's creditors. Independently of the restriction in the terms of the conveyance here, the opinions of two of the Judges held such a transference by any terms to be ineffectual, while the husband's possession continues. The grounds of this opinion will appear in treating of the transmission of corporeal moveables.* PROVISION OF
FURNITURE.

See *infra*, p.
448.

A frequent provision also is an allowance to the widow to purchase mournings, and, as the annuity or liferent does not usually commence until a term after the husband's death, it is provided either by a general obligation, or by appointing a sum for the purpose, that she shall be alimented from the period of the death, until the first term's annuity becomes payable. ALLOWANCE
FOR MOURNINGS,
AND *interim*
ALIMENT.

These are the customary provisions settled upon a wife in an antenuptial contract. They are designed to come in place of the *jus relictae*; but special provisions do not necessarily exclude that right. In order to be effectually excluded, it must be discharged either in express terms, which is the proper and advisable method, or by settlements of such a kind and amount as raise the presumption, that it DISCHARGE OF
jus relictae.

* Where a husband had, by antenuptial contract, made over to his wife, in case of her survival, his whole household furniture, and had been sequestered shortly before his death, it was held, that the widow had no claim to be ranked as a creditor for the value of the furniture, of which he had been divested in his lifetime; *Darling v. Mein*, 20th December 14 D. 206. 1851.

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M. 6457.DISCHARGE OF
jus relictæ,
contd.

15 D. 126.

5 D. 1297.

12 D. 276.

12 S. 222.

5 D. 483.

was intended to discharge the *jus relictæ*. Of the implied discharge there is an example in *Riddel v. Dalton*, 28th November 1781, where the husband having settled upon his wife the liferent of his whole effects heritable and moveable, and she having, in the event of her predecease, conveyed to him her share of the goods in communion and other rights, it was decided, that her acceptance of the universal liferent virtually implied a renunciation of the *jus relictæ*. But, if the settlement, by which such a liferent is provided, be revocable, her consent to it does not imply a renunciation of her legal rights; and a husband having revoked a settlement of that nature after his wife's death, her next of kin were found entitled to a share of the goods in communion; * *Leighton v. Russell*, 1st December 1852. Of the express discharge we have already had an example in *Johnstone v. Coldstream*, 30th June 1843, where, by a consent inserted in the testing clause, a wife accepted of provisions declared to be in full satisfaction of her half or third of moveables and other legal claims. Where the wife is not a party to the deed bestowing upon her the liferent of all her husband's property, the discharge of the *jus relictæ* is not implied by her acceptance of the provision; *Thomson v. Smith*, 8th December 1849. But, although the *jus relictæ* be not renounced during the marriage, it will be held as discharged, if, after the dissolution, the widow shall accept of provisions declared to be in satisfaction of it. But any acts of homologation, however strong, will not bar her from betaking herself to her legal claims, if such acts were done, while she was ignorant of the true state of her husband's affairs. Accordingly, homologation was found not to imply a discharge, in *Hope v. Dickson*, 17th December 1833, and *Ross v. Masson*, 3d February 1843, the widow having acted in ignorance of the extent of her deceased husband's property.

MODES OF MAK-
ING PROVISIONS
IN FAVOUR OF
CHILDREN OF
THE MARRIAGE.

(2.) *Settlements upon the children*.—These may also be made in various ways. The provision may consist of the capital of a sum to be liferented by the mother—or the husband may bind himself to provide a sum of a specified amount, or of an amount varying according to the number of children—or the children may be provided in the fee or capital of the conquest, or they may have the conquest or a part of it provided to them in addition to a provision by either of the methods already pointed out.

POWER OF DIVI-
SION.

M. 3193.

The provision to the children is made subject to division among them in such shares as the father shall appoint. The power of division may be extended also to the mother, to be exercised by her in case of survivance, should the husband leave no division, or to be exercised by the parents jointly, or by the survivor, failing a joint appointment. The power of division being inherent in the father, *Edmonstoun v. Edmonstoun*, 19th July 1708, it may be exercised by

* See *supra*, note, p. 422.

him, whether contained in the contract or not. But, when a division is made, it must extend to all the children, and, if any are excluded, it will be reducible to the effect of creating an equal division; *Campbell v. Campbells*, 22d June 1739.* This decision shews also, that it is competent to the father to delegate the power of division, and that, if the party whom he appoints to exercise it shall decline to act, the Court will not make a division. When only one of several children survives, the power of division is evacuated, and the survivor is entitled to the whole amount without any power of restriction in the father; *Brodie's Trustees v. Moubray's Trustees*, 12th November 1840. If the power of division is not exercised, each child is entitled to an equal share, and a posthumous child has a right to a share; *Oliphant v. Oliphant*, 19th June 1793. The issue of a child who has predeceased the term of payment are entitled to the share which their parent could have claimed if alive; and that, although there be no extension of the provision, or, as it is termed, substitution, in their favour. It was so decided, and recognised as the universal rule, in *Wood v. Aitchison*, 26th June 1789. As the provision originates in the father's act, his power of division may be extended, so as to enable him to apportion the share of a predeceasing child among his issue. But a father has no power to divide the share of legitim descending to his child among the issue of that child. This is implied in *Morton v. Young*, 11th February 1813, where it was found, that a father cannot appoint a substitute to his child, so as to regulate that child's succession as regards the legitim.

The provisions in favour of the children are followed by a declaration that they are in full satisfaction of their legal claims, and, in order to be effectual, this declaration must be very precise. A discharge of all that a child can claim through his father's death is not a renunciation of the legitim. In the words of Lord STAIR, "nothing can take away the bairn's legitim, unless it be discharged, and a presumption of accepting a tocher or portion in satisfaction will not be sufficient, unless it bear in satisfaction of the portion-natural and bairn's part, because the legitim is so strongly founded in the law of nature and positive law, that presumption or conjecture cannot take it off." In consistency with this doctrine it was held to be no discharge of legitim, where a daughter acknowledged that certain sums had been conveyed to her at her marriage in part of her patri-

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CHAPTER VI.
M. 6849.
POWER OF DIVISION, contd.

M. 13,043.

DISCHARGE OF
LEGITIM.

* The division must not be illusory, but the Court will not interfere, where there is merely a diversity in the amount of the sums assigned among the children. The Court will not set aside an unequal division, unless there has not been an honest exercise of the parent's power; it must be made very clear, that, in the exercise of that power, there has been such improper proceeding as really had for its object to defeat a child's interest under the deed; *Marder's Trustees v. Marder*, 29th March 1853, where the apportionment of £2000 among two children, giving only £50 to one, was held not illusory. 15 D. 633.

- PART II.
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13 S. 326.
14 S. 309 ;
2 Sh. & Macl.
App. 377.
- DISCHARGE OF
LEGITIM, *cont*^d.
- M. 5056.
- M. 461.
- mony ; *Clark v. Burns and Stewart*, 27th January 1835 ; and the receipt by the daughter of a Scotch nobleman, in articles of marriage executed in England, of a sum from her father as " her portion or " fortune," was held not to import a discharge of legitim ; *Marquis of Breadalbane v. Marchioness of Chandos*, 30th January 1836, affirmed 16th August 1836. The claim of the children to the dead's part and their mother's share of the society goods ought also to be included, when the renunciation is to embrace every legal claim. In treating of the extinction of rights, we have found, that, when a discharge is special, general words subjoined to it are limited to rights of the same kind as that specified ; and accordingly, in *Hepburn v. Hepburn*, 24th June 1785, the receipt of a child for a sum in full satisfaction of all bairn's part of gear, portion-natural, legitim, and *others whatsoever* that she could ask or claim *by* and *through* her father's death, was held not to imply a discharge of her right to a share of the dead's part. The terms used in the ordinary style, therefore, are properly very particular. It declares, that the provisions made in favour of the child or children shall be in full satisfaction of all bairn's part of gear, legitim, portion-natural, executry, and everything else that they could claim or demand *by* and *through* the death of their father and mother.* The necessity of an effectual exclusion of the legitim before marriage is evident from the consideration, that, after marriage, that right cannot be defeated by any deed of the father ; *Hog v. Hog*, 7th June 1791. Here a father domiciled in Scotland bequeathed large personal funds in England to one of his children, but the will being challenged by another child, the property was held subject to the claim of legitim. When there is no discharge of the legitim, but the wife has

- * Where a father in his lifetime obtains from a child, either gratuitously or for a valuable consideration, a renunciation of legitim, the effect of this renunciation is to increase the legitim fund falling to the children who have not renounced, in the same way as if the child who renounced had predeceased the father ; *Hog v. Hog or Lashley*, 7th June 1791, where the discharge was granted by the children to their father during his lifetime ; and *Lord Panmure v. Crokat*, 28th February 1856, where, by antenuptial contract satisfaction having been provided to the wife and younger children in full of *jus relictae* and legitim, the heir was held entitled to legitim, and the exclusion of the younger children found to operate in his favour as their death during the father's lifetime would have done. This rule has, however, no application, where the renunciation or discharge has been voluntarily granted by the children *after their father's death*, such discharge operating, not in favour of the children who claim their legal rights, but in favour of the general disponee ; *Fisher v. Dizon*, 16th June 1840. The grounds assigned for the distinction are, as laid down from the Bench in *Panmure's* case, " that, upon the death of the father, the full title to the child's share of legitim vests in " the child, becomes that child's property, and transmits to his representatives ; and, if the " child to whom the legitim has then become payable chooses to accept from the general " disponee the sum provided by the settlement as in full of legitim, the general disponee " must either be regarded as the purchaser paying the price, or as the debtor paying the " debt ; and, in either case, the benefit cannot accrue to the other children repudiating the " deed, whose shares of legitim had become fixed before the child accepting the provision " had exercised his or her option."
- M. 8193.
18 D. 703.
2 D. 1121.

discharged her *jus relictæ*, the effect of her renunciation is to make the division of the goods in communion *bipartite*, the one share being dead's part, and the other legitim; *Nisbets v. Nisbet*, 18th January 1726, affirmed 7th March 1726. In this case it was also held by the House of Lords, reversing the decision of the Court of Session, that a child could not take both his legitim and a provision in his father's contract of marriage, but that the one must be held to be to account of the other. But, in *Fraser v. Ranken*, 17th December 1835, a son was held entitled both to his legitim and to his share of a provision by contract of marriage. The case of *Nisbets* is not referred to in the latter report. It may be noticed, that a sum provided to a child or children by antenuptial contract is not, in the sense of the revenue Statutes, a gift by will or testamentary instrument, and is not, therefore, subject to legacy duty; *Advocate-General v. Trotter*, 12th November 1847. 14 S. 174. 10 D. 56.

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CHAPTER VI.
M. 8, 181.
Robertson's
App. 594.

One object of marriage settlements is to secure the wife or widow and children against the bankruptcy of the husband and father. It is, therefore, of great importance to observe the effect of the provisions which we have described, when brought into competition with the claims of creditors of the husband. The risk of such a competition is one of the grounds of expediency for executing a contract before marriage, while the parties still occupy the position of strangers to each other in the eye of the law—a position, which gives to their contracts a higher degree of onerosity than they can subsequently possess.

EFFECT OF PRO-
VISIONS BY AN-
TENUPTIAL CON-
TRACT IN COM-
PETITION WITH
CREDITORS.

First, then, as regards the wife's provisions—when the obligation is for an annuity to her payable after her husband's death, that confers upon her a *jus crediti*. She receives the character and right of a creditor of her husband, and is entitled, upon his bankruptcy, to be ranked upon his estate, and receive a dividend proportionate to the value of her eventual annuity. If the husband is alive, the amount ranked will be the sum which would purchase an annuity of the amount provided, payable to her if she shall survive her husband. If he is dead, the ranking will be the price of an annuity payable immediately, and to continue during her life. When there is a sequestration, the Act 2 & 3 Vict. cap. 41, provides for the valuation of contingent rights in its 39th section, and by section 40 for the valuation of annuities. Such valuation is to be made by the Sheriff, when a trustee has not been appointed, and by the trustee after his appointment, subject to review. A difficult question arises, however, when the annuity is dependent not only upon survivance, but upon the contingency of a second marriage, if the annuity is to be restrictable in that event. This question will be found raised, and opinions expressed upon it, but without a decision, in the case of *Comb v. Chapman*, 2d March 1826. COMPETITION, WHERE WIDOW PROVIDED BY WAY OF ANNUITY. 4 S. 513.

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MODE OF MAK-
ING WIFE'S PRO-
VISION PREFER-
ABLE TO
CREDITORS OF
HUSBAND.

When the design is to give the wife a claim, not merely co-ordinate with the creditors, but preferable to them, the fund which is to furnish her provision must be separated, placed beyond the *jus mariti*, and expressly appropriated to her use. This may be done either by taking the right to the wife herself excluding the *jus mariti*, or by paying it over to trustees, or investing it in their names for her behoof. The object is frequently accomplished by insurance upon the husband's life, assigned to trustees, or effected in their names under a declaration of the purpose of the trust. When the arrangement is of this nature, the husband must be bound to pay the annual premiums, and, if he shall fail, he may be forced to do so by the trustees, or by those appointed to attend to the execution of the contract on behalf of the wife and children. If he is possessed of funds, there may be a sum invested in name of trustees for the wife's benefit. The wife may also be secured by a cautioner on behalf of the husband, and, if the terms of the obligation imply that the cautioner is only liable if the husband fail to implement his obligation, the wife will be bound to discuss the husband's estate, before insisting on a charge against the co-obligant. Of this there is an example in *Wishart v. Wishart*, 16th May 1835, reversed 12th May 1837.

18 S. 769.
2 Sh. & Macl.
App. 564.

The most serious hazard, and against which it is difficult to guard, is that of poverty resulting from the husband's bankruptcy during his life. This can only be obviated by the separation of a present fund, and by excluding, in regard to it, both the *jus mariti* and the husband's power of administration. That is a course, however, which is seldom available, and it is regarded with repugnance by those who have the feeling of a common interest and a common responsibility. A bond by the husband for an alimentary allowance during his life will give the wife a *jus crediti*. This is common in England, and the Style book contains the form of a clause to the same effect in a Scotch marriage contract; but with us such a provision is rare.

COMPETITION
BETWEEN CHILD-
REN OF THE
MARRIAGE AND
CREDITORS.*Spes succes-
sionis.*

6 D. 1018.

Secondly, as regards provisions to children—it is to be observed, that the settlement of a sum payable at the father's death gives to them only a *spes successionis*, and it may, therefore, be defeated by any onerous act on his part, nor can the children compete with his creditors; *Goddard v. Stewart's Children*, 9th March 1844. Here the provision was payable by instalments at twelve and twenty-four months after the father's death, with interest from his death. The children were held not to be creditors. This principle results from the common interest of the children in the family association, which, as it secures to them benefits, so it also imposes corresponding liabilities. They cannot, therefore, be reckoned creditors of a fund, which being a property in communion between them and their parents is in a sense their own. The nature and force of this principle is strikingly illustrated by the light in which the law regards illegiti-

mate children. These have no right to legitim, no claim upon the dead's part, no interest in the family means, are in the eye of the law strangers, and, therefore, a provision to them gives them the position and right of creditors; *Ballantyne v. Dunlop*, 17th February 1814. Here a bond of provision to natural children, granted and delivered by the father while solvent, was held to confer a *jus crediti*, although not payable till his death. The children of the marriage, however, may have a *jus crediti* conferred upon them, and they will have that right, if their provision be made payable at a *fixed date*, or at a date which, though not precisely fixed, *may arrive during the father's life*; *Ballingall v. Hendersons*, 31st January 1759. Here the term of payment was the majority or marriage of each child, which was held to constitute them proper creditors. To the same effect are the cases of *Jolly v. Graham*, 24th February 1824, and *Cruikshank's Trustees v. Cruikshank*, 2d November 1853. The same result is produced, if the provision, although not payable till after the father's death, be made to bear interest from the majority or marriage of the children; *Mackenzie's Creditors v. His Children*, 2d February 1792. If the provision be payable at the dissolution of the marriage, that also will confer upon the children the character of creditors, because that event may happen during the father's life. The payment at a fixed term, or at a term which may arrive before the death of the father, must not be subject to any condition or contingency, otherwise there will be a mere *spes successionis*. Accordingly, in *Brown v. Govan*, 1st February 1820, although the amount was taken payable at the children's majority or marriage, it was stipulated by a subsequent part of the deed, that it should not be payable till after the father's death. The provision was, therefore, held not to import a *jus crediti*; and the same rule was applied in *Mactavish's Children v. His Creditors*, 15th November 1787, where, although marriage or majority was the stipulated term, the payment was dependent with regard to its amount upon whether this heir to a certain marriage should succeed to the father's estate.

The children can be made preferable to creditors only by taking the fee—that is, the right to the substance of the property or money—out of the father, and vesting it in them or in trustees for their benefit. We have not space to enter at present into a full examination of the important and difficult subject of fee and liferent, and shall only explain some of the familiar instances of the use and effect of these terms. When the fee of a sum of money remains in the father, it is subject to the diligence of his creditors, and the question, whether the children are creditors, will depend, as we have seen, upon the terms in which the provisions to them are conceived. It will not readily be presumed, that the father has been divested of the fee of his own money, unless terms be used which admit of no other con-

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MODE OF CONFERRING UPON CHILDREN A *jus crediti*.

M. 12,919.

2 S. 730.

16 D. 7.

M. 12,924.

M. 12,922.

MODE OF MAKING CHILDREN PREFERABLE TO CREDITORS.

PROVISIONS TO PARENT IN LIFE-RENT AND CHILDREN IN FEE.

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PROVISION TO
PARENT IN LIFE-
RENT, AND
CHILDREN IN
FEE.

9 S. 269.

12 S. 31.

4 S. 110.

struction. Although, therefore, a bond for money lent by the father be taken to the father and mother in liferent and to the children in fee, the children not being named, the fee still remains in the father, because it is said the law will not allow a fee to be *in pendente*. But, if the father's liferent be qualified by the word "*allenary*" or "*only*," that is held to be an absolute restriction, indicating that he is divested of the fee. A preference may, therefore, be conferred upon the children, by investing their provision upon a title exclusive of the father's right of fee, as, for instance, in favour of the wife in liferent, and the children in fee, excluding the *jus mariti*, or, in favour of the father in liferent for his liferent use *allenary* and the children in fee. In the case of *Macdonald v. M'Lachlan*, 14th January 1831, a separate bond was taken to the husband and his wife and the longest liver of them in liferent, and to the children already procreated or to be procreated in fee, whom failing to the husband himself and to his heirs and assignees. Under this destination the fee was held to be in the husband, the provision of liferent to him not being made absolute by the word "*allenary*" or "*only*," and the words substituting him upon failure of children of the marriage being held to decide where the fee lay. Such questions, however, are always in a great measure dependent upon the circumstances of the particular case, and the solution rests not merely upon the words used, but mainly also upon the intention of the parties, as indicated by circumstances which are looked to in explanation of the terms. Thus, where a sum was settled by the husband's father, payable at his death, upon the husband and wife in conjunct fee and liferent, (an expression which generally leaves the fee in the person from whom or from whose friends the fund was derived,) for the liferent use *allenary* of the wife if she should survive, and upon the children *nascituri* in fee, whom failing the husband, here, although the terms used would appear to indicate more decidedly a fee in the husband, than in the case of *Macdonald*, yet the fee was held to be in the children on account of various circumstances, viz., the wife's money having been settled on the children, which was held as an equivalent provision to them on the father's side—the interest being made payable to the children, even during the grandfather's life, if both parents should predecease them—a power of division being given to the father, which, if he was to have had the fee, was unnecessary, such power being inherent in a *fiar*—and the father being taken bound to invest the sum, when it should accrue, at the sight of persons named in terms of the destination prescribed in the contract; *Millar v. Millar's Children*, 14th November 1833. The presumption in favour of the father, that the fee is in him, is counteracted, if a trust be created in order to secure the children's provision; *Bushby v. Renny*, 23d June 1825. Here the father bound himself to pay £10,000 to the children of the marriage at the first term after the death of the longest

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PROVISIONS TO
PARENT IN LIFE-
RENT, AND CHILD-
REN IN FEE,
CONT'D.

liver, and to infeft certain trustees for the children's security, the money, if he should pay it to redeem the lands, being to be lent by the trustees on security for payment to himself of the interest during his life and after his death to his wife, and on her death for payment of the principal sum to the children, and failing them in trust for himself and his heirs. Here the settlement as regards the destination was substantially the same as in the case of *Macdonald*, where the fee was held to be in the father, but the presumption of the fee being in the father was, in this case, held to be redargued by the conveyance to trustees, and by the security given to them in implement of the obligation, and the fee was therefore held to belong to the children. The same decision was pronounced in the subsequent case of *Herries, Farquhar, & Co. v. Brown*, 9th March 1838, where the 16 S. 948. opinions of the whole Court were taken, in which opinions there will be found a full examination of the law and decisions upon this subject. The circumstances of the case were these:—In an antenuptial contract the husband, standing infeft in certain lands, bound himself to pay £20,000 to the younger children of the marriage, payable at such terms and in such proportions as he should appoint, and, failing any appointment, six months after his death equally among the children, interest to run from his death. He granted a precept to infeft trustees for behoof of the younger children in security of the £20,000, and he also disposed his lands to himself and a series of heirs under burden of the provision to the younger children. Infeftment having been taken both by the trustees and the husband, it was held, in an action at the instance of subsequent creditors of the husband, that the trustees were, in virtue of their infeftment, entitled to compete with the diligence of the pursuers, and to rank in their proper order according to the preference conferred upon them by their heritable security. In the case of *Cruikshank's Trustees v.* 16 D. 7. *Cruikshank*, 4th November 1853, it was held, that provisions to children under antenuptial contract, payable at majority or marriage, give the children a *jus crediti*, and that the father, having granted heritable security therefor in favour of trustees, was debarred from competing, after the children's majority, with their claims upon the rents and price of the estate, over which their provisions had been secured without any reservation of his liferent or power of control. The precise effect of a trust is well brought out in *Wood v. Begbie*, 12 D. 963. 7th January 1850, where the husband assigned a sum to trustees, with instructions to invest the capital, and pay the interest to him during life, and after his death to hold the capital for the purposes of the marriage-contract. The husband having been sequestrated, his creditors were preferred to the liferent, and the marriage trustees to the capital. The effect of the qualifying word "*allenary*" will be seen exemplified in *Cunningham v. Thomson*, 19th June 1827, where 5 S. 814.

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a bond in terms of a settlement, giving a fund to a wife and her husband in liferent for their liferent use allanarly, and to the children of the marriage in fee, was held to make the parents liferenters and the children fiars. When a fund is vested in the husband and wife in conjunct fee and liferent, the fee, by the ordinary presumption, is in the husband, and his creditors can, therefore, attach it under burden of the wife's liferent.

CONVEYANCE
OF TOCHER TO
HUSBAND.

(3.) *Disposal of the Wife's Property.*—The usual settlement of the wife's property is simply to convey it to the husband. It then forms a part, but only a part, of the consideration upon which the provisions granted by him are made; and the interests of the widow and children are regulated exclusively by these provisions, which, in their amount and the mode of securing them, will be determined in some measure by a regard to the wife's means. The sum which may be given by the wife's father along with her hand is called the tocher. When she possesses any special fund, such as a bond, or an expectation of property to be acquired during the marriage, the conveyance of such property or expectation to the husband in fee or liferent vests him with a complete right, which will be available to himself or his creditors, although he may have failed to implement obligations in the marriage-contract to secure her provisions; and his non-implementation of these does not authorize the wife to retain her own funds, unless they have been specially destined by the contract to form a security for her provisions; *Greenhill v. Aitken or Ford*, 24th June 1824. But where a particular fund belonging to the wife has been conveyed under an obligation to lay it out for her behoof, that gives her a claim preferable to his creditors while the fund exists; *Partners of the Haddington Woollen Manufactory v. Gray*, 20th January 1781. On the other hand, the main consideration for the provisions settled by the husband in the marriage contract, is the marriage itself, and not the tocher; and, therefore, the husband is liable to make good the wife's provisions, although the tocher have not been paid; *Wightman v. Wilson*, 30th July 1777.

8 S. 169.

M. 9144.

M. 9201.

RESERVATION
OF WIFE'S
MEANS TO HER-
SELF.

EXCLUSION OF
jus mariti AND
RIGHT OF AD-
MINISTRATION.

If it be intended to reserve the wife's property to herself, that may be done effectually by excluding the *jus mariti*, notwithstanding the opinion of STAIR, where he says as to excluding the *jus mariti*:—"The very right of the reservation becomes the husband's *jure mariti*, and makes it elusory and ineffectual, as always running back upon the husband himself, as water thrown upon a higher ground doth ever return." This is a subtlety which has long been disregarded; and there is no doubt that both the *jus mariti* and the husband's right of administration can be effectually excluded, as was done in the case of *Murray's Trustees v. Dalrymple*, 5th February 1745, by the wife's conveyance, before marriage, for behoof of herself and her chil-

M. 5842.

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EXCLUSION OF
JUS MARITI AND
RIGHT OF AD-
MINISTRATION,
CONT'D.

dren. Assignment by the wife of moveable property, in an antenuptial contract, in such terms as to give to the husband only the life-rent with a fiduciary fee on behalf of the children, forms an effectual exclusion of the *jus mariti*. Such an assignment does not require to be intimated in order to exclude the husband's creditors. They are not entitled to presume, that he obtains the rights conferred by the legal assignment attendant upon marriage, and it is their business to inquire what were the conditions of the marriage; *Rollo v. Shaw or Ramsay*, 28th November 1832. Where the wife's property is vested in the joint names of the husband and wife, that is notice that the wife has a separate interest, and such property is not attachable for the husband's debt. So, where bank shares were bought with the wife's funds, and the transfer taken to her husband and herself, the bank was not allowed to retain the shares in satisfaction of a debt due by the husband; *Gairdners v. Royal Bank of Scotland*, 22d June 1815. The *jus mariti* and right of administration may be excluded also by third parties bestowing property upon the wife and family; *Annand and Colhoun v. Chessells*, 4th March 1774. Here the wife's father, in conveying his estate for behoof of her in life-rent and her children in fee, debarred the husband's *jus mariti*, and him from the administration and management. The House of Lords affirmed the judgment of the Court of Session, whereby it was found, that neither the funds nor the annual rents were affectable by the husband's creditors. At the same time, the *jus mariti* is an interest strongly founded in the law, and it can only be excluded, therefore, by words which unequivocally express or import such exclusion. A general reservation of the parties' respective means from the control of each other was held ineffectual to exclude the *jus mariti*, in the case of *Cuthbertson v. Pollock*, 22d November 1799. But, when property is thus separated from the operation of the ordinary rules of law, it must be kept in a distinct form, as by securities in the name of the wife, or, where it consists of real moveables, they must be inventoried; *Macdonald or Duff v. Doig*, 29th January 1793. Here furniture belonging to the wife, and settled by antenuptial contract for her behoof, was, notwithstanding, allowed to be pointed for the husband's debt, because there had been no inventory, and it was held that everything moveable is presumed to be the husband's, until the contrary be proved.* The *jus mariti* may also be debarred by the conveyance of the wife's pro-

11 S. 132.

F. C.

M. 5844.

Hume, 206.

M. 5848.

* It is not an unlimited principle, that all moveable property of the wife becomes, immediately on marriage, the property of the husband. The doctrine of presumed ownership does not go so far. Accordingly, where a house and furniture had been disposed by a stranger to an unmarried woman, exclusive of the *jus mariti* and right of administration of any husband she might marry, and to her heirs and disponees, the furniture was held sufficiently protected by force of such conveyance against the diligence of the creditors of her husband, whom she had married after the disponent's death, and who came to reside in her house, although

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M. 5846.

perty to trustees; *Blair v. Malloch*, 25th January 1776. It is unnecessary to dwell upon the ordinary rule of law which exempts the wife's *paraphernalia* from the *jus mariti*.

(4.) *Provision against premature dissolution of the marriage.**—By this it is declared, that, although the marriage be dissolved within a year and day without a living child, yet the contract and whole provisions shall subsist and be effectual, notwithstanding any law or practice to the contrary. In order to subject settlements made before marriage to the rule which renders them inoperative by dissolution within year and day, it is necessary that such settlements shall have been made expressly in contemplation of the marriage. For, if they have a foundation irrespective of the marriage, that will exempt them from the effects of the dissolution, which are confined to provisions of which marriage is the consideration. Accordingly, a disposition to a betrothed wife for pure love, favour, and esteem, was found effectual to her, although the marriage dissolved within year and day, because not granted expressly in contemplation of marriage; *Hunters v. Brown*, 24th July 1766. But it is a well-established rule, that all settlements by marriage contract fly off upon the dissolution of the marriage within year and day, if there be not a clause to prevent that result.

NOMINATION OF
PARTIES TO
DEMAND IMPLE-
MENT ON BE-
HALF OF WIFE
AND CHILDREN.

The marriage contract nominates parties to require implement on behalf of wife and children. This provision is designed to secure attention, when necessary, to the interests of the wife and children. The Court will always appoint tutors or curators *ad litem*, when a suit is instituted. But the benefit of the nomination in the contract is, that it provides parties with powers of inquiry and interference, when occasion may arise, and thus obviates the consequences of neglect. If the provision be omitted in the contract, the Court will supply it, and name parties to concur with the wife and children in carrying on suits or doing diligence for implement and security of their provisions; *Macpherson*, 18th January 1773. It is also to be observed, that while the nomination of such guardians is a precaution on behalf of the wife and children to secure their rights, it does not render these rights conditional upon the acts of the parties named, and their claims, therefore, are not impaired by the negligence of those appointed. Accordingly, in *Wilson or Wishart v. Wishart*, 16th November 1844, a cautioner was subjected in liability, although the husband's obligation for which he was bound, was only to secure a certain

they had executed no marriage contract by which the *jus mariti* was renounced, nor was there any conveyance of her property by the wife previously to the marriage to trustees, in order to guard her rights; *Young v. Loudoun*, 26th June 1855.

17 D. 998.

* This provision is no longer necessary; 18 Vict. c. 23, § 7; see *supra*, note, p. 422.

sum on being required by trustees, and the husband had never been so required, and died insolvent.

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We have thus examined the leading provisions of the antenuptial contract. It will be completed with a clause of registration, and testing clause in ordinary form. It must be kept in view, that, although the contract be executed and completed, it is not immediately effectual, its operation being suspended until the marriage itself takes place. This is evident from the preamble, which, while it bears that the parties accept of each other as lawful spouses, adds, that they promise to solemnize the bond of marriage with all convenient speed. Before the marriage takes place, therefore, the contract, although executed, may be resiled from, which will annul all its provisions, leaving to the party aggrieved a claim of damages for breach of promise. But, while a perfect deed does not make a marriage, the completion of the marriage has an important effect upon an imperfect deed, a defective contract of marriage being validated by the subsequent marriage. Of this we have already, in treating of homologation, seen an example in the case of *Wemysses v. Wemyss*, 16th November 1768, where the deed was held effectual, though not subscribed by the wife, but only by her father and the husband. The same doctrine is exemplified in *Bushby v. Renny*, 23d June 1825, 4 S. 110. already cited, the deed, which consisted of three sheets, having been signed only upon the last page; and the principle will be found very forcibly stated in *Falconer v. Macleod*, 14th January 1830, Lord 8 S. 312. GILLIES remarking, that, in order to make a relevant case for reduction, after marriage has taken place on the faith of the deed, it is not enough to allege defects in the solemnities, but forgery must be averred—that is, that it is a contract which the parties did not even intend to execute; and of this Baron Hume has preserved an illustration in *Wilson v. Pringles*, 24th February 1814, where the wife's signature (if genuine) had been procured by the forcible leading of her hand, she being ignorant of the contents of the deed. Hume, 923.

OPERATION OF
CONTRACT SUS-
PENDED TILL
MARRIAGE.

HOMOLOGATION
OF DEFECTIVE
CONTRACT.

M. 9174.

4 S. 110.

8 S. 312.

Hume, 923.

2. *Postnuptial Settlements*.—A contract made *after* marriage does not necessarily differ in its terms from one made before, excepting in the narrative, which, instead of an acceptance by the parties of each other and a promise to solemnize the marriage, bears that no contract was made at the time of the marriage, and that the parties, to supply that defect, have now resolved to make a settlement. But there is an important difference in the effect of the contract, from its being made after marriage instead of before it. The parties are not now independent contractors. They do not occupy the relation of strangers,

DIFFERENCE
BETWEEN
ANTENUPTIAL
AND POSTNUP-
TIAL CON-
TRACTS.

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DIFFERENCE BETWEEN ANTE-NUPTIAL AND POSTNUPTIAL CONTRACTS.

M. 988.

4 S. 32.

1 D. 396.

POSTNUPTIAL SETTLEMENT, HOW FAR REVOCABLE BY A SPOUSE.

8 S. 210.

2 Dow's App. 342.

but have a common interest in the property held in communion. Their contracts regarding it, therefore, cannot possess the onerous character of those between strangers, but, on the contrary, are contemplated with some degree of jealousy, as dealings between parties, who have a mutual interest adverse to the interest of those who stand in the position of creditors towards the family property. The postnuptial contract cannot, therefore, possess a character so highly obligatory as one made before marriage. Still, however, the marriage itself, although past, is an onerous cause for provisions to a certain extent; and, therefore, a postnuptial provision to a wife is sustained, in so far as it is moderate in amount, and suitable to the circumstances of the parties, provided the husband has not, at the date of granting it, incurred other debts and obligations exceeding the amount of his means. In *Campbell v. Campbell's Creditors*, 26th July 1744, a bond, granted to a wife after marriage for an annuity of £100, was sustained to the extent of £50; and, in *Jeffrey v. Campbell's Children*, 24th May 1825, a postnuptial settlement, little exceeding the value of the property received with the wife, was also sustained, upon proof of the husband's solvency at the date of the contract. The case of *Sharp v. Christie*, 19th January 1839, is to the same effect, a life interest disposition granted during solvency to a wife not otherwise provided for, and not excessive or unsuitable, being held onerous and irrevocable, and, when followed by infetment, preferable to creditors.

Settlements after marriage are subject to the rules of law affecting donations *inter virum et uxorem*; and they are, therefore, revocable, in so far as granted without proper or remuneratory consideration. The means of the parties form an element in judging of the propriety and adequacy of the settlement, and, where a postnuptial provision to a wife was greatly inadequate, considering her husband's means, she was held entitled to revoke her acceptance of it, although judicially ratified; *M'Neill v. Steel's Trustees*, 8th December 1829. There the chief ground for allowing the revocation was, that the widow was to forfeit the entire provision, if she married a second time. This was held to make the provision grossly unequal, and she was held entitled to revoke, even after her husband's death. But, if the provisions are rational and equal, the mutual considerations render the contract onerous, and it cannot be revoked; *Hepburn v. Brown*, 6th June 1814. Here a postnuptial contract gave the entire property of the spouses (with an exception on both sides) to the survivor. The husband afterwards executed a settlement in favour of a different party, which was challenged by the widow. The Court of Session found, that the postnuptial contract was gratuitous, and, therefore, revocable. But the House of Lords reversed the judgment, holding the provision not to be gratuitous, inasmuch as by the contract the wife had debarred her next of kin from claiming half the goods in communion,

if she should predecease, and she had also given up certain legal claims, and bound herself to educate and settle the children, and to secure a provision to them equal to half the goods. Besides the element of equality, regard is to be had also, as already noticed, to the consideration of the suitableness of postnuptial provisions to the party's means at the time of granting them. A postnuptial contract is revocable by a wife, only if she can shew, that its provisions in her favour are disproportionate to the husband's means at the date of the contract. The criterion is the state of his fortune *then*, and not at his death; *Nisbett v. Nisbett's Trustees*, 24th February 1835, and see also 13 S. 517. *dictum* of Lord MONCREIFF in *Dixon v. Fisher*, 8th February 1839. 1 D. 474. The grounds upon which the provisions in a fair and deliberate mutual contract after marriage are not revocable will be found shortly and clearly stated by the same learned Judge in *Thornhill v. Macpherson*, 20th January 1841. 3 D. 394.

As regards children, it is clear that the claim of legitim cannot be barred by a postnuptial contract. Postnuptial provisions may be settled on the children, and these will be held irrevocable, where the circumstances yield a reasonable presumption that this was intended, as in *Smitton v. Tod*, 16th December 1839, where there was a *de præsenti* conveyance of bonds to trustees, authorizing them *inter alia* to apply the proceeds in the maintenance and education of the granter's children. The provision was held to be irrevocable. 2 D. 225.

On the other hand, when the rights of husband and wife are settled by antenuptial contract, deeds made afterwards, by which either party gives up, without consideration, advantages secured by the previous contract, are donations, and, therefore, revocable. Such subsequent deeds cannot prove their own narrative, nor can the power of revocation be elided by giving an interest to a third party, such interest depending virtually upon the pleasure of the party favoured. These doctrines will be found clearly stated in Lord MONCREIFF's interlocutor, and illustrated by the circumstances, in *Jardine v. Currie*, 17th June 1830. 8 S. 937. The antenuptial settlement being thus regarded as full implement of the onerous obligations of the parties, therefore, in regard to subsequent provisions, or to the removal of restrictions affecting provisions made before marriage, the wife is regarded as a donee, and for these she cannot compete with creditors. So, in *M'Lachlan v. Watson*, 6th July 1839, the qualification imposed upon an annuity in an antenuptial contract, by its being declared terminable upon the wife's second marriage, having been removed by a posterior deed, the wife was found entitled to rank only *pari passu* with a legatee, to whom she would have been preferable, had the postnuptial declaration given a right of credit. This case may be advantageously compared with *Ross v. Mackenzie*, 11th July 1838, where an annuity, provided before marriage, was held to give such a right of preference, that implement

POSTNUPTIAL
PROVISIONS TO
CHILDREN.

EFFECT OF
POSTNUPTIAL
DEED, ALTER-
ING ANTENUPTIAL
CONTRACT.

8 S. 937.

1 D. 1177.

16 S. 1385.

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POSTNUPTIAL
PROVISIONS TO
CHILDREN HELD
GRATUITOUS

of it must be secured, although at the risk of excluding legatees entirely.

Provisions to children in a postnuptial contract are accounted gratuitous; and they are, therefore, reducible, if the father was insolvent at the date of delivery.

LIMITATION OF
HUSBAND'S
POWERS AS
FIAR.

6 S. 875.

HUSBAND'S
POWER TO MAKE
SETTLEMENTS
ON SECOND WIFE
AND FAMILY.

M. 18,036.

2 S. 549.

When the fee of the fund provided remains by the terms of the marriage settlement in the husband, there is no doubt that he may, for onerous causes, dispose of or exhaust it, remaining under a personal obligation to make good the provisions. But he cannot gratuitously assign, so as to disappoint the provisions. His powers, however, are not limited so as to prevent acts, which, although not manifestly obligatory, are reasonable, and, in point of prudence, expedient. The question to be solved in such cases is, whether the act done be in fraud of, or contrary to, the engagements of the marriage articles. In *Colquhoun v. Mackay*, 28th May 1828, a husband having granted a bond to his wife's daughter by a previous marriage, for a sum bequeathed to the wife by another daughter, but in regard to which the power of testing was doubtful, and the deed having been challenged by the wife and the children of the second marriage as *in fraudem* of the contract, by which the whole property had been provided to the survivor of the spouses in liferent and to their children in a specified order in fee—the Court held that the bond was not *in fraudem tabularum nuptialium*, because, although the husband might be under no legal obligation to grant it, nevertheless it was a prudent and rational act, and that, therefore, it could not be reduced. In general, however, the course of prudence will be, where the whole property is settled, to regard the father as precluded from diverting the funds. But in one respect, there is no doubt, that, unless excluded by a very stringent form of the settlements, the husband retains the power of moderate encroachment upon them, and that is, in order to make a reasonable provision for the wife and family of a second marriage. This power, however, must be exercised within due limits, and, if so used as to encroach in excess upon the obligations of the first contract, such exorbitant settlement will be disallowed, as in the case of *Bruce v. Glen*, 7th February 1761, where large additional provisions, made at a distance of time after the second marriage in favour of children by it, were reduced. The decision in *Wood v. Fairley*, 3d December 1823, is to the same effect; and the latter case likewise illustrates these points, viz.:—the onerosity of a postnuptial contract, containing fair and onerous mutual provisions—the liability of property held by a spouse under an obligation for provisions to be diverted by onerous acts—and its security against gratuitous acts. As the validity of the provision in the second contract is founded upon the natural obligation implied in the marriage, it does not

appear to be material in regard to such a settlement, whether it be granted before or after the marriage; and a provision to a second family, excessive in amount, is not more binding, because contained in an antenuptial contract. So, in *Duncan v. Sloss*, 8th February 1785, a jointure to a second wife, made in an antenuptial contract, and of an amount disproportionate to the granter's means, was restricted "to a rational extent," in the same manner as if it had been granted in a postnuptial contract. It is necessary here, however, to look to the mode in which the provisions to the first family are settled. If the husband is divested of the fee, and the fund placed beyond his control, as by the creation of a trust, it is difficult to see how, upon principle, the fund can still be held to be within his power of settlement. Mr. Bell in his Commentaries says, that, if the provisions to a wife are granted after the contraction of debt, (which is the position of a party who has validly transferred the fee of his property to his children,) the natural obligation to aliment a wife will sustain the provision to a moderate extent. But, in *Guthrie v. Cowan*, 21st November 1846, the Judges of the First Division were equally divided upon the question, and a reference to the whole Court was prevented by compromise. The practitioner, therefore, must regard it as a doubtful point, whether a provision, however moderate, can be made in favour of a second wife out of a fund already settled in fee upon the children of the former marriage.

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M. 987.

I. 642.

9. D. 124.

3. *Bonds of Provision*.—We shall now shortly consider the deeds by which provisions may be settled after marriage, otherwise than by postnuptial contract. These are called bonds of provision; and, regards a bond of provision in favour of a wife, we have only to remark, that, where there are already settlements, it ought distinctly to express, whether the new obligation is intended to form an addition to prior provisions, or whether it be in partial or entire fulfilment of them. If the new deed is silent on that point, then it is determined by the rule, *debitor non præsumitur donare*, and the new obligation is reckoned a fulfilment of the prior one. But, if the new settlement bear expressly to be granted for love and favour, then it is reckoned an additional provision; *Fenton v. Skinner*, 23d January 1673.

BOND OF PRO-
VISION IN
FAVOUR OF
AS WIFE.BONDS OF PRO-
VISION IN
FAVOUR OF
CHILDREN.

This form of deed may be used not only to make provisions in favour of children, but to divide also those already settled, and then the marriage contract should be narrated. Here the presumption is different from the case of the wife, a subsequent settlement in favour of children being held additional, unless declared to be in part of previous provisions; *Clark v. Hay's Trustees*, 16th May 1823, where a legacy to children was held not to include their provision under the marriage contract. But this presumption may be overcome by cir-

Ersk. Inst. iii.
3, 93.
2 S. 313.

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F. C.

cumstances tending to the contrary inference, and admitting the operation of the ordinary rule, *debitor non præsumitur donare*, as in *Earl of Wemyss v. Lady Frances Trail, &c.*, 23d November 1810, where a fund for making provisions to younger children having been created by an entailer, the heir in possession in granting provisions to his children and grandchildren without specifying the source of payment was presumed to burden that fund, and not his private estate. The maxim is held to apply also, where a father makes a settlement upon a child in such child's contract of marriage. In *Robertson v. Robertson's Heirs*, (or *Mackintosh v. Robertson*.) 27th November 1685, a tocher of 5000 merks settled with a daughter was held inclusive of a legacy of 500 merks, previously uplifted by the father as her administrator-in-law.

M. 9619.

EFFECT OF
BOND OF PROVI-
SION IN GIVING
CHILDREN A *jus*
crediti.
M. 974.

A bond of provision gives a right of credit, if the father was solvent when he delivered it, the *onus probandi* as to solvency lying upon the child; *Cult's Creditors v. His Younger Children*, 5th August 1783. When such a bond is intended to be in full of the child's provision, the father ought to obtain from the child an express renunciation of the legitim, or an acceptance of the bond as in full of the claim on that head.

APPLICATION
OF MAXIM *dies*
incertus, &c.,
TO BONDS OF
PROVISION.

If the sum in the bond be payable at majority or marriage, these events form conditions of the obligation, and one or other of them must exist, in order to make the obligation complete; *dies incertus pro conditione habetur*. The provision, therefore, lapses if the child die before majority unmarried. But, if the term of payment be a fixed, though distant time, the bond when delivered constitutes a vested interest available to the next-of-kin of the grantee; and so, in *Campbell v. Pollock*, 7th December 1717, a bond to a son, payable five years after its date, was held good to the assignee, although the son died before the term of payment. But the condition is not removed by naming a date at which it will be fulfilled, if the payment notwithstanding be left contingent; *Bells v. Mason*, 1st February 1749. Here the obligation was to pay at Whitsunday 1747, "which would be the first term after the grantee attained the age of sixteen." He died before that age, and the provision was, therefore, found not due.

M. 6342.

M. 6332.

EFFECT OF PRO-
VISION PAYABLE
TO CHILD AT
FATHER'S
DEATH.
M. 6343.
M. 13,043.

If the provision be payable at the grantor's death, it falls by the child's predecease; *Gordon v. Ross*, 17th November 1757. But, as settled by the case of *Wood v. Aitchison*, already cited, if the predeceasing child leave issue, such issue will be entitled to it. If there is no issue, however, it lapses absolutely by the child's predecease, even though destined to heirs, executors, and assignees; *Russell v. Russell*, 10th March 1769. A provision, payable at the grantor's death, does not give children a *jus crediti* in competition with the father's creditors, though it be granted when the father was solvent,

M. 6372.

and though it contain a consent to registration for execution. This doctrine will be found applied in a case, which illustrates it the more strongly, that the sum provided consisted of rents of property belonging to the children's mother, but which had become vested in the father; *Geddes*, 5th July 1836. The Court held that the children were not creditors of their father. When no date of payment is specified, the sum is not payable *de presenti*, if it appear that payment *de presenti* was not the understanding of the parties; *Berry v. Henderson's Trustees*, 24th June 1836. Here a provision to a daughter with no term of payment expressed, was found not payable till after the father's death, the whole arrangements indicating such to have been the understanding and intention.

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CHAPTER VI.

14 S. 1084.

14 S. 1008.

Substitutions in Provisions.—Substitution in a provision is the appointment of a person to take it upon failure of the first grantee. In moveable rights generally, however, the right provided to the person second called is evacuated, if the person first called, and who is termed the *institute*, is once vested. One substituted in such terms that his right fails, if the institute survive the granter, is, therefore, called a *conditional institute*—i.e. one whose right depends upon the condition, that the first grantee shall predecease the granter. Proper *substitutes* are those, whose right does not fly off upon the succession of the institute, but continues, so that they may take the provision when the institute, after enjoying the right, shall die. The best example of substitution is an entail, by virtue of which the substitutes in their order have a vested interest, which cannot be affected by any act of the heir in possession. The substitutions recognised by the Roman law were merely conditional institutions, which vanished, if once the institute succeeded; and our earliest practice was the same. Afterwards, a stronger effect was given to substitution, the substitute succeeding in moveable rights, although previously taken by the institute. Thus, in *Christie v. Christie*, 13th July 1681, a substitute was preferred to the next-of-kin of the institute, although the institute had survived the testator, and completed his title by confirmation, the Lords holding that the substitution imported a tailzied succession. At a later date, in the case of *Brown v. Coventry*, 2d June 1792, while it was held, that tailzied succession—that is, succession as in an entail, which cuts off all not specified in the destination—may take place in grants of moveables, yet, as these are not naturally the subject of such a destination, this is not to be presumed *in dubio*; and in this case, therefore, a sum of money having been bequeathed to one in liferent and to her heirs in fee, whom failing to A. B., A. B. was held to be a conditional institute—that is, one appointed to receive, if the institute failed—and not a substitute, and, therefore, the executor of the liferenter's child was pre-

AS A GENERAL
RULE, THERE IS
NO PROPER SUB-
STITUTION IN
MOVEABLES.

CONDITIONAL
INSTITUTION.

CASES OF PRO-
PER SUBSTITU-
TION IN MOVE-
ABLES.

M. 8197.

M. 14,863.

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CHAPTER VI.

EFFECT OF
SUBSTITUTION
OF CHILDREN
TO EACH OTHER,
AND OF CLAUSE
OF RETURN.

ferred to A. B. It cannot with certainty be predicated, however, that in no case will a substitution in moveables take effect.

When in a provision the father substitutes the children to each other—that is, giving the amount to the survivors, if any one or more should die without issue, such a substitution implies a prohibition against the children disappointing each other, and bars them, therefore, from assigning their shares gratuitously; *Macreadie v. Macfadzean's Executors*, 15th November 1752. This was a provision to two children and the survivor. One of them bequeathed her share to her husband, but the survivor was held preferable by virtue of the substitution. But, although a child may not gratuitously alienate, where there is a substitution, he may do so for causes which are reasonable, though not onerous, as in *Smith and Wallace v. Smith*, 14th December 1710, where the conveyance bore to be granted “out of a grateful sense of good offices and services.” The same principles apply to bonds, which contain a clause of return in favour of the grantor—i. e., a declaration, that upon the death of the grantees named the obligation shall cease, or the amount be repaid to the grantor. Such a clause cannot be gratuitously defeated; *Johnstone v. Irving*, 22d June 1824. This was a bond for £300 to the grantor's nieces, “whom failing, to the heirs of their bodies, whom all failing,” the obligation was to be at an end; and it was declared, that, though the sum should have been paid up, yet, if the children of the nieces should die without heirs, the sum should revert and return to the grantor. The only niece having assigned the bond gratuitously, the assignee sued for payment, but the Court found, that upon payment both the assignee and his cedent the niece must become bound, that, in the event of her death without heirs, the clause of return should receive effect, and the money be recoverable from her means. A bond with a clause of return may, however, be assigned for onerous causes. The grantee may demand payment without finding security, since his credit was trusted to at the date of granting, unless he be *vergens ad inopiam*, in which case he must find caution to make good the return; *Beatson or Lumsden v. Beatson*, 30th June 1747. The second report of the case of *Smith and Wallace* shews, that the substitution takes effect, although the predeceasing child die before the term of payment, a sum provided to a particular child, where there is right to the survivors, being payable to the survivors, although such child do not live until the term of payment. This is also illustrated by *Binning v. Creditors of Auchenbreck*, 15th December 1749. When there is no substitution, the share of a predeceasing child lapses. If the terms used imply, that there is to be no right, unless the institute survive and take, then they infer a substitution; and, as the provision lapses by the death of the institute, the claim of the substitute is thereby evacuated also. On the other hand, a condi-

M. 4402.

M. 4332.

3 S. 163.

M. 4345.

M. 4332.

M. 6337.

tional institution saves the right of the party second called, its purpose being, that, if the institute do not take, the conditional institute shall do so. This distinction will be found clearly illustrated in Lord CORBHOUSE'S note to *Broomfield v. Campbell*, 24th November 1835. 14 S. 51. Here there was a provision, varying according to the number of children, viz., £5000 if one child, £7500 if two, and £10,000 if three or more, with a declaration, that the share of a child dying before it was paid or became payable should revert to the survivors, this was held to be a conditional institution and not a substitution, and the mere existence of two children who died in infancy was held to give to the third and surviving child a right to the whole £10,000, as conditional institute, whereas, if she had been a substitute, no right could have arisen to the shares of the sisters, as they had never vested in them. The same principle was applied in *Dunlop v. Crawford*, F. C. 2d June 1812, where a substitution to surviving children was held to carry the share of a predeceasing child to them as conditional institutes. The words used were the "deceaser's share," and it was felt as a difficulty by some of the Judges, that no child could correctly be said to have had a share, unless he survived and took it. Had that view been entertained, the effect would have been to render the substitution nugatory, as dependent upon the institute's survivance; but the opinion prevailed, that the words were to be taken in the vulgar or popular sense, as meaning the share which the deceased would have taken by survivance, and that the survivors had right to it as conditional institutes.

There is only further to be noticed, the presumption implied in all bonds of provision, that, if the institute predecease leaving children, they will, under the *conditio si sine liberis decesserit*, take in preference to the substitute, although there be no mention of issue. This rule received effect, where the destination was to five daughters, or such of them as should be in life at the death of the granter's wife and son, so as to give a share to the issue of a daughter who predeceased them both; *Roughheads v. Rannie*, 14th February 1794. M. 6403.

Conditio si sine liberis.

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CHAPTER VII.

CHAPTER VII.

DEEDS RELATING TO MOVEABLE REAL RIGHTS—DISPOSITION OF
MOVEABLES—MARITIME WRITS.

MOVEABLE rights, as we have already found, are corporeal or incorporeal. The latter, being rights arising out of the obligation of another party, require writing to make them visible, and are, therefore, much more the subject of conveyance, than those rights which are corporeal, and of which, according to the ordinary rule of law, possession is the proper title. The rights of corporeal moveables are also called moveable real rights; and it is erroneous to suppose, that the term "*real*" is limited to heritable property, although it is familiarly used as convertible with the word "*heritable*."

PURPOSE OF
THIS DEED.

Disposition of moveables.—When moveable real rights are conveyed by a written title, the deed is called a disposition of moveables; and we have already seen, that Mr. Erskine is not warranted in censuring the use of the term *disposition* as applied to a conveyance of moveables, that being the proper name of a deed operating a real transference of the thing conveyed, while assignation is more fitly descriptive of those which give the grantee a right of action. The general purpose of the disposition of moveables is to give a right to the disponee, the possession remaining with another. When that other is the grantor himself, the conveyance is of an imperfect nature, as we shall presently find.

FORM OF DISPO-
SITION OF MOVE-
ABLES.

The form of the disposition is simple. It is founded upon the price or other consideration, and the grantor sells, disposes, assigns, and makes over, to the disponee, and his heirs, executors, and assignees, the moveables of whatever description—it may be, the household furniture within a dwelling-house specified. If books and pictures are also to be conveyed, they should be mentioned. But, in order to remove all doubt, the deed should refer to an inventory containing all the articles, and which must of course be subscribed by the disponent; and this is the prudent course to follow, whether the conveyance be of furniture or of farm implements and stock, or of whatever other corporeal moveables it may consist. The warrandice is from fact and

deed, and there is a consent to registration and for execution if necessary. If the moveables disposed are delivered along with the disposition, that is a complete transference. If they are not delivered, an instrument of possession may be taken. In form this is somewhat analogous to infeftment. The disponee and two witnesses, with a notary-public, repair to the place where the moveables are, and the disponee produces the disposition and inventory. These are presented to the disponent, and handed by him to the notary-public to be read and published, after which the disponent delivers to the disponee *ex propriis suis manibus* possession, by delivering the effects themselves, or an individual of each species. An instrument is extended by the notary, of which as well as the disposition there will found be the ordinary form in the Styles of the Juridical Society.

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INSTRUMENT OF
POSSESSION.

Vol. ii. p. 247.

It is carefully to be noted, however, that the disposition and instrument of possession are utterly unavailing to vest the disponee with any effectual title in competition with the diligence of creditors, if the moveables remain in the possession of the granter. The doctrine on this point is contained in Mr. Erskine's Institutes, to the effect, that all rights of moveable subjects granted *retentâ possessione* are presumed to be collusive for the granter's own behoof, and only intended as a cover against his creditors. Of this there will be found various illustrations in the Dictionary and in Brown's Synopsis, under the title "PRESUMPTION," and head "RIGHTS PRESUMED SIMULATE." We shall notice only *Chalmers v. M'Aulay*, 18th January 1739, in which there was furniture disposed upon the 16th May, but left with the granter till the 8th August, when the possession was transferred to the disponee. Previously to delivery, however, upon the 2d August, a creditor of the granter had given him a charge of horning, and, on the 10th, two days after delivery, he arrested in the hands of the disponee. It was held, that the disposition being in the eye of the law simulate *retentâ possessione*, and having that character at the

EFFECT OF DIS-
POSITION AND
INSTRUMENT OF
POSSESSION, IN
QUESTIONS WITH
CREDITORS.*
iii. 5, 5.

M. 11,590.

* The doctrine of the Law of Scotland, adopted from the Roman Law, "*Traditionibus, non nudis pactis, dominia rerum transferuntur*," has been greatly modified in its effects by the provisions of the Mercantile Law Amendment Act, 19 & 20 Vict. c. 60, passed to remedy inconvenience "felt by persons engaged in trade." It enacts, in §§ 1, 2, and 3, that, where goods have been sold, but not delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of the seller, after the sale, to attach them as belonging to the seller, to the effect of preventing the purchaser and his creditors from demanding and enforcing delivery. When a purchaser who has not obtained delivery shall sell the goods, the purchaser from him is entitled to demand delivery from the seller, who must, on intimation of such subsequent sale, make delivery on receiving payment of the price, and cannot retain against such subsequent purchaser for any separate debt or obligation due to him by the original purchaser; but the seller's right of retention for payment of the purchase price, or any right of retention competent to him, (except as between him and such subsequent purchaser,) or any right of retention arising from express contract, is reserved entire. But the seller, before intimation of a second sale, may arrest or poind the goods in his own hands.

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M. 10,602.

7 S. 420.

supra, p. 425.

10 D. 1280.

13 D. 373.

15 S. 916.

WHERE GOODS
ARE IN HANDS
OF A THIRD
PARTY CUSTO-
DIER.

F. C.

MARITIME
WRITS.

date of the charge, it could not afterwards be made effectual by possession to the prejudice of the creditor's diligence. The insufficiency of the instrument of possession in competition with a poiding creditor, is shewn in *Corbet v. Stirling*, 6th July 1666. As a recent illustration, reference may be made to *Borthwick v. Urquhart or Grant*, 17th February 1829, where the granter of a trust-disposition, by which he had assigned his furniture with an inventory, having been allowed to continue in possession, it was found to be validly attached by poiding at the instance of a creditor, who had not acceded to the trust. We have already had occasion to notice the futility of an attempt to give a married woman a right of fee during the marriage in furniture originally belonging to the husband, and remaining in his possession. To the same effect is *Campbell v. Stewart*, 13th June 1848; and, in similar circumstances, the trustee upon a husband's sequestrated estate was found entitled to sell the furniture for the benefit of his creditors, in *Brown v. Fleming*, 19th December 1850. But a conveyance of a house to trustees, with a right of liferent of the furniture in favour of A. while residing in that house, was held (though with difficulty) to exclude A.'s creditors from claiming it on the ground of his ostensible ownership, the fee being held to be in the trustees, and the possession in virtue of the liferent; *Scott v. Price*, 13th May 1837.*

As against the disponent and his heirs the disposition and instrument of possession will form a good title, wherever the possession may be, and the right will also be available against third parties when the moveables are in the hands of another than the disponent, provided the person in possession have the knowledge of the conveyance and delivery imposed upon him. The instrument of possession, according to the form we have referred to, does not imply notice to the custodier, nor is such a form necessary, if he be otherwise certiorated, and mere intimation, as of an assignation, will complete the transfer; *Eadie v. Mackinlay*, 7th February 1815.

Deeds relating to ships.—There is one class of moveables which cannot be conveyed without a written title, in consequence of express statutory provisions to that effect, viz, ships. Deeds relating to ships are of various kinds. In the Juridical Society's Styles, where they are treated of under the title of maritime writs, they are divided into (1) Deeds relating to the building and transference of vessels—(2) Securities upon vessels—and (3) Deeds relating to their employment, agreements with seamen, and insurance.

Vol. ii. p. 537.

17 D. 998.

(1.) *Deeds relating to the building and transference of vessels.*—In the Styles there will be found the form of a contract for building a ship. It

* See also the case of *Young v. Loudon*, 26th June 1855, *supra*, note, p. 435.

contains, on the one hand, the shipwright's obligation to build for the other party a ship of a specified size and description, and to have her ready for sea by a day fixed, under a certain penalty. On the other part, the purchaser binds himself and his heirs to pay the price at a certain rate per ton, but not exceeding a specified amount, by instalments payable respectively—the first, when the keel is laid—the second, when the vessel is launched—and the third, when she is cleared at the custom-house—upon attestation by a neutral tradesman, that the vessel is finished in terms of the contract, or of a relative specification. Then there are a general penalty, and a consent to registration. When finished, the vessel is delivered to the owner, and there may be a deed of transfer by the ship-builder, but that is unnecessary, unless the ship have been registered under the statutory regulations, to which we shall now refer.

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CONTRACT FOR
BUILDING A
SHIP.

In order to enjoy the privileges of a British ship, the vessel, when finished, must be registered in terms of 8 & 9 Vict. cap. 89, which consolidates the previous statutes relating to ships, and declares in § 4, that a vessel not duly registered, and exercising any of the privileges of a British ship, shall be liable to forfeiture. This statute is altered by 12 & 13 Vict. cap. 29, which extends the privilege of registration to vessels not wholly built in the British dominions, removes the disqualification of ships repaired in a foreign country, and allows vessels captured by foreigners or sold to them to be again registered, when they become the property of British subjects.* The registry is made upon a declaration by the owner or owners, according to specified rules,† setting forth the particulars required to be contained in the certificate of registry. Of this declaration a new form is introduced by the 19th section of the new Act.‡ On this declaration being made before the officers named in the Act, the particulars are entered in a register book, and there is issued by the registrar a document called the certificate of registry, of which a new form is prescribed by the 18th section of the Act, 12 & 13 Vict. cap. 29.§ It

REGISTRY ACTS.
8 & 9 Vict. c.
89.
12 & 13 Vict.
c. 29.
17 & 18 Vict.
c. 104, § 30.
CERTIFICATE OF
REGISTRY.

* The statutes 8 & 9 Vict. c. 89, and 12 & 13 Vict. c. 29, are repealed by the Merchant Shipping Acts' Repeal Act, 17 & 18 Vict. c. 120; and the statutes by which British Merchant shipping is now regulated, are the Merchant Shipping Act, 17 & 18 Vict. c. 104, (1854)—the Act, already referred to, 17 & 18 Vict. c. 120—and the Act 18 & 19 Vict. c. 91, which amends the statute of 1854. By the first of these Acts, § 19, when a ship has not been duly registered in terms of the statute, she cannot be recognised as a British ship, and is liable to detention till a certificate of registry is produced.

† 17 & 18 Vict. c. 104, § 35.

‡ The declaration of ownership must now be made in terms of schedules B and C, appended to 17 & 18 Vict. c. 104.

§ The certificate must now be in the form prescribed in schedule D, annexed to 17 & 18 Vict. c. 104, and must comprise the following particulars, (§ 44,) viz., the name of the vessel and her port—the details as to tonnage, build, and description, required by § 36—the master's name—the particulars as to her origin, stated in the declaration of ownership—the name and description of the registered owner, or owners, and, if more than one owner, the proportions in which they are respectively interested, indorsed upon such certificate. Change of owners,

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declares who are the whole owners—the ship's name, place, and burden, with the name of the master—when and where built, or, in the case of a foreign-built vessel, that the declarants do not know these particulars—and a description of the measurement, rigging, and build of the vessel, these being verified, in so far as regards the vessel's form and dimensions, &c., by a certificate of the builder. The certificate of registry is the evidence of the ship's claim to the privileges of a British vessel.

NUMBER, AND
SHARES, OF
OWNERS OF A
VESSEL.

When there are more owners than one, the property of the vessel is, by § 35 of the Act 8 & 9 Vict. cap. 89, held to be divided into 64 equal parts, and the proportion of each owner is to be described in the registry as so many 64th shares. The number of proprietors of one ship cannot exceed thirty-two, excepting in the case of minors and creditors, who are reckoned only by the guardian or trustee representing them, and excepting also joint-stock companies.* A part owner may sue without concurrence of the other owners for his share of damage; *Lawson v. Leith and Newcastle Steam Packet Co.*, 26th November 1850.

13 D. 175.

TRANSFER OF
SHIPS.

The property of a ship after registry can only be transferred in the manner prescribed by § 34 of 8 & 9 Vict. cap. 89, viz., by a bill of

and of master, must be indorsed on the certificate of registry; §§ 45, 46. The following notice is appended to schedule D:—"A certificate of registry granted under the Merchant Shipping Act, 1854, is not a document of title. It does not necessarily contain notice of "all changes of ownership, and in no case does it contain an official record of any mortgages affecting the ship." Thus the register-book is now the sole evidence of title; the certificate serves for manifesting the nationality and for the identification of the ship.

* "The property in a ship shall be divided into sixty-four shares. Subject to the provisions "with respect to joint owners or owners by transmission hereinafter contained, not more "than thirty-two individuals shall be entitled to be registered at the same time as owners of "any one ship; but this rule shall not affect the beneficial title of any number of persons or "of any company represented by or claiming under or through any registered owner or joint "owner. No person shall be entitled to be registered as owner of any fractional part of a "share in a ship; but any number of persons not exceeding five may be registered as joint "owners of a ship or of a share or shares therein. Joint owners shall be considered as constituting one person only as regards the foregoing rule relating to the number of persons "entitled to be registered as owners, and shall not be entitled to dispose in severalty of any "interest in any ship, or in any share or shares therein in respect of which they are registered. A body corporate may be registered as owner by its corporate name."—17 & 18 Vict. c. 104, § 37. It is enacted by § 43, "That no notice of any trust, express, implied, "or constructive, shall be entered in the register-book, or receivable by the registrar; and "subject to any rights and powers appearing by the register-book to be vested in any other "party, the registered owner of any ship or share therein shall have power absolutely to dispose in manner hereinafter mentioned of such ship or share, and to give effectual receipts "for any money paid or advanced by way of consideration."

The provision that the registered owner has absolute power of disposal of his share is of great importance; and, in the case of a trading company possessing a ship, all the partners ought to be entered in the register. If the partners, however, exceed five in number, unless the company is a corporate body, neither the company nor all the members can, under the provisions of § 37, be registered as owners of a share; they will only be entitled to a beneficial interest in the share, while the legal right and power of disposal is in the party registered.

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sale, (in Scotland, the conveyance of a ship is usually called a *vendition*,) containing a recital of the certificate of registry or the principal contents of it; and, although an error in the recital will not be fatal, provided the identity of the ship be sufficiently proved by the instrument, yet, if the transfer fail in setting forth a recital of the certificate or its principal contents, it is declared not to be valid or effectual for any purpose whatever either in law or equity.* Keeping in view this essential requisite, the form of the vendition is simple, containing a clause of assignation by which, in consideration of the price, the seller sells, assigns, and conveys to the purchaser the ship or vessel, described by name, port, and burthen. If the boats are also sold, it is necessary that they be mentioned. The copy of the registry is introduced at the end of the conveyance, after which there are the usual words, "*surrogating and substituting*" the assignee—then a clause of absolute warrandice, and a clause of delivery of the certificate of registry and other papers. The bill of sale or vendition does not pass the property in a ship until it is entered in the register, and the particulars indorsed by the proper officer upon the certificate of registry. The date of indorsement upon the certificate is the criterion of preference, the transfer which is first indorsed being preferable, although another be earlier entered in the register. But, in order to give time to the first transferee to complete his right, the registering officer is prohibited from registering a new transfer until thirty days after a prior one has been entered, so that the first may be made effectual by indorsement.† In illustration of the stringency with which the provisions of the Statute are enforced, these two cases may be noted;

VENDITION OR
BILL OF SALE—
FORM OF.

VENDITION
MUST BE REGIS-
TERED.

CRITERION OF
PREFERENCE
AMONG VENDI-
TIONS.

* The transfer of ships and shares therein is now regulated by § 55 of 17 & 18 Vict. c. 104, which enacts that,—“a registered ship or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale; and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar, and shall be in the form marked E in the schedule hereto, or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of, and be attested by, one or more witnesses.” The recital of the certificate of register is no longer required.

† By the recent statute, the certificate is no longer evidence of title, and indorsement upon such certificate is not now the criterion of preference. It enacts, that “every bill of sale for the transfer of any registered ship, or of any share therein, when duly executed, shall be produced to the registrar of the port at which the ship is registered, together with the declaration hereinbefore required to be made by a transferee; and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share comprised in such bill of sale, and shall indorse in the bill of sale the fact of such entry having been made, with the date and hour thereof; and all bills of sale of any ship or shares in a ship shall be entered in the register book in the order of their production to the registrar,” § 57. No transferee can be registered, till he has made a declaration in a given form, corresponding with that of the original owner; § 56. If a registered owner desires to give power to another to sell or to mortgage his ship at any place abroad, he can do so by obtaining from the registrar a certificate for that purpose, to be called a certificate of mortgage or of sale; § 76 *et seq.* Such certificate possesses this advan-

- PART II. *Scott and Gifford v. Miller and Kerr*, 16th November 1832. Here
 CHAPTER VII. the parties registered being proved not to be the true owners, but
 11 S. 21. trustees for a foreigner, they were held not entitled to recover insurance upon a loss of the vessel; the qualification of owners of British vessels, is, however, extended by § 17 of the new Act, 12 & 13 Vict. cap. 29.* The serious consequences of neglect to register are shewn
 3 S. 625. by *Walker v. Pollock*, 5th March 1825, where a proprietor not registered was held to have no title to sue for the price of the ship.

MORTGAGE OF
SHIPS.

(2.) *Securities upon vessels*.—A ship may be transferred by way of mortgage for a loan, in which case the instrument must recite the certificate or its contents; and it is completed in the same manner as a bill of sale or vendition of the property, with this addition, that the entry in the register, and the indorsement, must both bear that the transfer was made only as a security. When a mortgage or assignment of a ship in security has been registered, the right of the mortgagee is not affected by the owner's subsequent act of bankruptcy, so that the registry operates in the same manner as infestment upon an heritable right.†

- The mortgagee of a ship must beware of taking possession unless prepared to undertake the responsibilities of ownership. In *Russell v. Baird & Co.*, 13th June 1839, one who held a security upon a vessel, having acted as if in possession, was found liable for furnishings.
 1 D. 931.

tage, that no *bonâ fide* mortgage or sale can be impeached on the ground that it was carried through after the death of the person giving the power.

In case of the transmission of the property, or the interest of a mortgagee, in any ship or share, by death, bankruptcy, or marriage, &c., the registrar, the fact and circumstances of such transmission being authenticated to him by declaration of party, and by the proper legal evidence of the transmission, must enter the name of the party in the register book as owner. And the persons, if more than one, and however numerous, to whom such property may be transmitted, shall, as regards the rule relating to the number of registered owners, be considered as one person; §§ 59, 60, 74, 75.

* The description and ownership of British ships are now defined by 17 & 18 Vic. c. 104 § 18.

† By the recent statute, mortgages of ships are to be in the form set forth in a schedule, and registered in the order of their production, the registrar making a memorandum, on the instrument of mortgage, of the date and hour of such record; §§ 66, 67. On production of the instrument of mortgage, with a receipt for the money indorsed, the discharge of the mortgage must be entered by the registrar in the register-book, whereupon the estate of the mortgagee revests in the person who, but for the mortgage, had been entitled to it, § 68. Mortgages are to have priority according to the date of their record in the register-book, § 69. A mortgagee shall not, by reason of his mortgage, be deemed to be the owner, nor the mortgager to have ceased to be the owner of a vessel, except so far as is necessary for making it available as a security for his debt, and he may absolutely dispose of the mortgaged interest, §§ 70, 71. A registered mortgage shall not be affected by an act of Bankruptcy committed by the mortgager after the date of recording, though the ship or share was, at the time of such act, in his order and possession as reputed owner, § 72. A registered mortgage may be transferred; and the transfer must be entered in the register-book, and a memorandum thereof, and of its date and hour, indorsed on the instrument of transfer, § 73. Under those provisions an indorsement of a mortgagee's interest upon the certificate of registry is no longer necessary, as it was under the previous statutes.

In the Style Book will be found the forms of other securities applicable to the peculiar nature of this kind of property. There is the bond of bottomry—a security for money borrowed by the owner to fit up and supply the ship with necessaries before a voyage, or by the ship-master for repairs and furnishings in a foreign port, or when he cannot communicate with the owner. In return the obligant becomes bound to repay a certain larger amount (the difference being the premium) after the vessel's safe return, but the lender takes the risk of the vessel being lost. In this species of security not only the borrower, but the vessel also, with her tackle and appurtenances, is bound to the lender.* It is otherwise in the bond of respondentia, which is granted for money borrowed upon the security of goods and merchandise laden and to be laden on board the ship for a specified voyage. The bond is personal, and upon the freight, but not affecting the vessel, and, in the same way as by the bond of bottomry, the lender, in consideration of a large increase in the sum to be repaid, runs a hazard of loss.

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BOND OF BOTTOMRY.

BOND OF RESPONDENTIA.

(3.) *Deeds relating to employment of vessels, &c.*—Ships are let upon hire by a deed called a charter party—*carta partita*, i.e., a writing divided. It consists of mutual obligations. On the one part the owner freights the vessel to the other party for a defined voyage, engaging that she shall be in good condition and properly manned, ready at a specified port and time to receive the cargo—that she shall sail without delay—deliver the cargo—receive the home cargo, and sail with the first favourable wind homewards—and deliver safely the home cargo, the dangers of the seas, rivers, and navigations, the restraints and detentions of princes and republics, and all other dangers and accidents being excepted. On the other hand, the freighter engages to furnish cargoes, and pay freight at a specified rate per ton, or, if it be a time bargain, at a certain rate per month.

CHARTER-PARTY.

Of these and other deeds connected with ships there will be found many precedents among the Juridical Society's Styles. There are also forms of deeds relating to the hiring of seamen, which is now regulated by the 7th & 8th Vict. cap. 112, and the forms contained in the schedules subjoined to that Act.†

* When the master borrows money in bottomry at maritime interest, and pledges the ship and freight for repayment on the termination of the voyage, the owners are not personally responsible; *Cochrane v. Gilhison*, 14th February 1854.

16 D. 548.

† The Act 7 & 8 Vict. c. 112 was, so far as related to agreements with seamen, repealed by the Mercantile Marine Act, 13 & 14 Vict. c. 93. The latter Act was repealed by 17 & 18 Vict. c. 120, but the greater part of its provisions, with some modifications, are re-enacted by the Merchant Shipping Act, (1854,) 17 & 18 Vict. c. 104.

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CHAPTER VIII.

THE FACTORY AND POWER OF ATTORNEY.

A FACTORY is a deed by one person authorizing another to exercise a right or rights in his place. Such authority is also called a commission, when the business devolved is of great value and importance. The appointment is also styled a power or letter of attorney ; but these terms are more familiarly applied to authorities to be executed in England or other foreign countries.

FACTORIES,
GENERAL OR
SPECIAL.

Factories are general or special. The former confers general powers of management. The special factory, on the other hand, either limits the factor's power to one of the things contained in the general factory, or it confers a power not bestowed by the general factory, and which the factor would not possess, unless it were specially conferred.

FORM OF
FACTORY.

The form is simple:—(1.) The consideration or cause of granting is set forth, whether it be present or intended absence—or indisposition—or other impediment—or, simply, the desire of the granter to commit the management of his affairs generally, or of the special matter mentioned, to the management of the person appointed. (2.) The granter then nominates and appoints A., designing him as factor, or (in cases of magnitude) as factor and commissioner. (3.) The factor's powers are specified. (4.) A declaration is inserted, that the acts of the factor shall be as valid as if done by the granter himself. (5.) It is provided, that the factory shall subsist until it is recalled. (6.) There is an obligation upon the factor to account, and to pay to his constituents the balance of his intromissions, under deduction of a reasonable gratification for his trouble.

POWERS OF
FACTORS.

We shall examine briefly the powers of a factor. A general factory or mandate confers only powers of general management, such as the collection of rents and interests, and such acts of ordinary administration as are necessary to preserve an estate and render it productive. If, therefore, it is intended, that the factor shall be entitled to do any extraordinary act, the factory must contain a special power to that

ACTS OF MAN-
AGEMENT RE-
QUIRING SPECIAL
AUTHORITY.

effect. We shall notice some acts which cannot be done without special authority :—

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POWER TO SELL

HERITAGE.

(1.) It is incompetent for a factor, not specially authorized, to sell a heritable estate, or moveables of great value. In the case of *Thomas v. Walker's Trustees*, 4th July 1829, a sale of heritage was sustained, where it was ambiguous whether the factory contained that power, the constituents having recognised other sales. But a Conveyancer can only be secure by adhering to the general principle.

TO SERVE CON-
STITUENT HEIR.

(2.) Nor can a factor, without express power, enter his constituent as heir in a succession, so as to incur risk by representation. The responsibility of exposing a client to such hazard is greatly increased by the facilities granted by the Service of Heirs Act for restricting the liability of the heir to the value of the succession. When the factor has authority to enter his constituent as heir, he enjoys an implied power to do whatever may be requisite to support the claim, and, therefore, to raise an action of reduction of an adverse service; *Gifford v. Gifford*, 11th February 1834. A general commission was formerly sufficient authority to serve the granter of it heir to a lucrative succession; *Molle v. Riddell*, 13th December 1811; but the Service of Heirs Act in its third section empowers only mandatories specially authorized to sign a petition of service.

TO COMPROMISE
AND SUBMIT.

F. C.

10 S. 43.

1 Cr. and St.
App. 340.

8 S. 594.

(3.) Special power is requisite to compromise the constituent's claims, or to submit them to arbitration. In *Hollinworth v. Dunbar*, 21st January 1813, a merchant was held not debarred from suing for his whole debt, although his travelling agent had agreed to a composition; and, in *Bridges v. Willison's Trustees*, 22d November 1831, a factor having agreed to postpone his constituent's security to certain outlays, the agreement was held void from want of authority. So also, where a factor took bills from his constituent's debtor, thus granting delay without the privity or sanction of the principal, he was found liable for loss accruing; *Ainslie v. Arbuthnot & Co.*, 7th February 1743. We have already had occasion to refer to *Livingston v. Johnson*, 23d February 1830, where an agent, having without authority submitted his client's claim to arbitration, was held personally liable for implement of the decree-arbitral.

TO BORROW.

(4.) If the factor is to have power to borrow money, and to give the personal security of his constituent, or the security of his estate, that must be expressly stated, and a consent to execution against the constituent inserted in the registration clause of the factory. In particular circumstances the Court has extended the construction of a factor's powers, so as to support a loan made in order to preserve the property, as in *Thomson v. Fullarton*, 23d December 1842, where a loan made in order to pay calls on railway shares, and thereby prevent forfeiture of the shares, was sustained.

5 D. 379.

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POWER TO AP-
POINT SUB-
FACTOR.
14 S. 521.

(5.) A factor cannot without express authority appoint a sub-factor, it being incompetent to delegate his powers; *Dempster v. Potts*, 18th February 1836. When the factor is empowered to name a sub-factor, he ought to be exempted by the deed from liability for the sub-factor's intromissions.

These are examples of extraordinary acts which require to be specially authorized; and it is to be kept in view, that, under the rule *posteriora derogant prioribus*, where general powers are followed by a specification of particulars, the authority will be restricted to acts of the same kind with those particularized.

TERMINATION
OF FACTORY.BY CONSTITU-
ENT'S RECALL.

16 S. 217.

The factory is brought to an end in various ways:—

(1.) The mandant or constituent may at his pleasure recall it either directly, or by granting a factory of later date to another, which is an implied revocation. The power of positive recall is strongly exemplified in *Walker v. Somerville*, 13th December 1837, where, although a large commission had been promised, the mandant was held entitled to revoke at pleasure, on reimbursing the factor for his outlay and trouble. Even when granted for an extended period, as during life, a factory may be recalled upon just grounds. The case of *Heddrington v. Book and Dods*, 14th July 1714, is an example of revocation allowed in consequence of gross incapacity. In mercantile commissions it is common to invest the factor with a character which gives him credit; and, in such cases, the recall must be duly notified to third parties, in the same way as a dissolution of copartnery, in order to release the constituent from liability for the factor's subsequent transactions. When a factory is recalled, the granter must relieve the factor of all obligations properly undertaken in the discharge of his duties; if he have made advances, for instance, he must be indemnified for these; *Broughton v. Stewart, Primrose, & Co.*, 17th December 1814.

F. C.

BY RENUNCIATION.

(2.) Factory may terminate by the factor's renunciation of the office. But he must take care in renouncing, that his employer has proper notice, otherwise he will be liable for damages occasioned by a precipitate relinquishment.

BY DEATH OF
CONSTITUENT.7 Wil. & Sh.
App. 211.5 S. 86.
3 Wil. & Sh.
App. 384.BY CONSTITU-
ENT'S BANK-
RUPTCY.
F. C.

(3.) The factor's power ceases upon the death of the mandant; and, where there are several constituents, upon the death of any one of them, whereby the power of the whole is dissolved as in the case of tutors-dative; *Stewart v. Baikie*, 29th February 1832, reversed 7th April 1834. But the factor is entitled to act, until he receives authentic accounts of his constituent's death; *Campbell v. Anderson*, 7th December 1826, affirmed 1st May 1829.

(4.) The bankruptcy of the constituent extinguishes the mandate. In the case of *Pollock v. Paterson*, 10th December 1811, there will be found much interesting and important discussion upon the ques-

tion, whether a procuratory falls upon the insanity of the granter. **PART II.**
As regards parties ignorant of the insanity, it appears to be agreed, **CHAPTER VIII.**
that *bonâ fide* contractions by such parties are binding.

(5.) The factory falls by the death of the factor, and, when there are **BY FACTOR'S**
several factors without a quorum, or power to each, the death of any **DEATH.**
one brings it to an end. It is another inconvenience attending factories to more than one person without power to them severally or to a quorum, that the whole number must concur in every act.

In those factories which, on account of the limited nature of the authority granted, are called special, the factor has no power, excepting what is expressed; and, if there be a general clause appended, its effect is limited to acts of the same nature as those specified.

The factor's obligation to his constituent is to account for his **FACTOR'S OBLI-**
intromissions, and to pay the balance, deducting a reasonable gratifi- **GATIONS, AND**
cation, as it is called, for his trouble. A salary may be specified; **REMUNERATION.**
but, when there is no mention of remuneration, the office is presumed to be gratuitous; *Orbiston v. Hamilton*, 17th February 1736. Where **M. 4063.**
an allowance is contemplated, but no sum fixed, the Court will determine the amount. In *Campbell v. Rose*, 6th December 1752, two and **M. 516.**
a half per cent. was given; but this depends entirely upon circumstances. In accounting the factor is not entitled to deduct from the funds in his hands debts of the constituent paid without his authority, his recourse in such circumstances being by action, and not by compensation; *Marquis of Douglas v. Sommervill*, 24th July 1678. **M. 2625.**

By acceptance of the office the factor is bound to discharge its duties. When it is without recompense, he is liable for his intromissions only, and not for exact diligence. But, if there is a factor-fee, he is liable for loss arising through mismanagement; *Goldie v. Mac-* **M. 3527.**
donald, 4th January 1757. Here the factory was special, to take out confirmation of a moveable estate to which the granter was entitled. The duty having been neglected, the succession was found, in the then existing state of the law, not to be carried by his will, and the factor was in consequence subjected for loss arising to his widow. See also *Cunningham and Simpson v. Buchanan*, 6th July 1809. But, although **Hume, 349.**
there is remuneration, the factor may be exempted from liability except for his intromissions, and in such circumstances liability for loss by negligence—as where a debt becomes irrecoverable through delay—does not arise; *Stewart, &c. (Fraser's Trustees) v. Falconer*, 9 S. 178.
14th December 1830. When the factor is paid, he is bound to do such diligence as the security of the property under his charge requires—such as to use sequestration in due time for recovery of rents. If in any case he has doubts as to the course to be adopted, he should submit the circumstances and his views to his constituent, and, if the employer then leaves the matter to his discretion, he will

- PART II. not be liable for loss ; *M'Caul v. Vareils*, 8th February 1740. What-
CHAPTER VIII. ever the factor does must be done *factoris nomine*, otherwise he will
M. 3524. be personally liable—of which we had an example in the acceptance
M. 4065. of bills by procuration ; and, in *Ainslie v. Arbuthnot*, 6th June 1739,
loss arising through the bankruptcy of an acceptor was held to fall
upon the factor, because he had taken bills in his own name without
notice to his constituent, and without any entry in his books to show
that the transaction was really in his constituent's business.

CHAPTER IX.

TRANSMISSION OF MOVEABLES FROM THE DEAD TO THE LIVING—
TESTAMENT—CONFIRMATION—LEGACY.

HAVING now examined the deeds by which obligations affecting moveable rights may be contracted—those also which are used in the transmission of these rights—and the writings by which moveable rights are enforced or extinguished—it remains that we attend to the instruments by which moveable property may be transmitted, not from the living to the living, as in those already reviewed, but from the dead to the living.

I. THE TESTAMENT.—In the history of rights it is plausibly conjectured, that succession or inheritance was antecedent to the power of devising, the right of the deceased being held to be extinguished by his death, and his family receiving the succession by the simple title of next occupancy. But the right of inheritance was found, while it remained indefeasible, besides producing the evils of fraud to creditors, unsuitable to the family circumstances, there being no power of distribution. Hence arose the right of disposal by expressed intention of the mode in which one wishes his property to be bestowed after his death. This right is exercised by testament, which Blackstone defines as “witnessed instructions,” thus deriving the term from the form of the deed. The etymology of Jacob, “*testatio mentis*,” i.e., evidence of the deceased’s mind or will, connects it more properly with the substance of the thing. The English term “will” flows from the nature of the deed as containing the party’s pleasure in the disposal of his effects. A conveyance which becomes immediately binding upon the granters is not a will, although it may dispose of the moveable property which shall belong to him at his death. A mutual conveyance by several parties, conveying *de presenti* all their property now belonging, and which shall belong to them at death in favour of themselves and the survivors and survivor, with power of sale and obligation of warrandice, was held not to be

ORIGIN OF
POWER TO DE-
VISE.

- PART II.** a will, but an irrevocable deed for onerous causes ; and no inventory, or legacy duty was demandable on the death of one of the parties ;
- CHAPTER IX.** *Browns v. The Advocate-General*, 28th June 1852.
- 1 Macq. App. 79.** By our law and practice any probative writing expressive of a party's intention with respect to the disposal of his moveable estate at his death is sufficient, if clear in its terms, to secure the fulfilment of that intention. But the *testament* is the instrument regularly appropriated to this purpose. The *codicil* is a short paper of a testamentary nature, and applies to supplementary additions to testaments expressive of new provisions, or suppressions, or alterations, in the testator's will as already made. Moveable property is also in practice commonly settled either by itself, or in conjunction with heritage by the form of a disposition. The variety of available forms is characteristic of the principle, that any clear expression of intention legally authenticated will suffice. But the testament is the proper legal instrument for settling the granter's moveable property at his death.
- WHAT CONSTITUTES A VALID WILL.**
- TESTAMENT.**
- CODICIL.**
- DISPOSITION.**
- CAPACITY TO MAKE TESTAMENT.**
- TESTAMENT MUST BE INTEL- LIGIBLE TO TESTATOR.**
- 4 S. 200.** The law has extended the power of making a will to some persons who are disqualified to execute other deeds. A pupil cannot, but a minor may without his curator's consent, and a wife without her husband's consent, make a will. So also persons interdicted without consent of their interdictors, and generally every person above the age of pupilarity, capable of expressing a rational intention as to the disposal of his property, can test. But, while the law thus gives full effect to the party's intention, it requires that the instrument shall truly express that intention ; and the Conveyancer must keep in view, that the settlement he prepares must be of a nature intelligible to the testator who executes it, because, although a party may have sufficient mind to dispose of his property, he may not have sufficient perspicacity to comprehend the effect of involved technical clauses. See the case, formerly cited, of *Watson v. Noble's Trustees*, 18th November 1825, affirmed 29th June 1827. In circumstances of suspicion, the Court requires evidence that the settlement was clearly understood by the maker of it. Thus, where the will was that of a person old and paralytic, there being no evidence that he clearly understood it, and no evidence, therefore, that it truly expressed his will, it was reduced ; *Gillespies v. Gillespie*, 11th February 1817 ; and in *Paterson v. Smyth*, 2d February 1809, a will written by an agent in favour of himself was reduced, no instructions being proved, and no evidence adduced that the deed or the scroll of it was read to the testator.
- 2 Wil. & Sh. App. 648.**
- F. C.**
- Hume, 921.**
- Jus relictæ AND LEGITIM CANNOT BE PREJUDICED BY A WILL.**
- M. 8170.** A husband cannot by his testament prejudice the *jus relictæ*, or a father the legitim, nor can he, after being seized with his last illness, bestow the society goods in such a way as to diminish the shares of his widow and children. In *Jervey v. Watts*, 7th January 1762, legitim was found due to a posthumous child, and claimable by such

child's executors, notwithstanding a general disposition in favour of the widow. A testament in favour of strangers is ineffectual, if the maker of it have children after it is made, by the rule *si sine liberis*, unless the testament be preserved after the existence of the children, in which case it will be effectual excepting as to legitim, *Yule v. M.* 6400.

Yule, 20th December 1758. Here a party took bonds payable to himself, and failing him to his brother. Having afterwards married and had children, he died two years after the birth of the first without changing the destination in the bonds. The brother was preferred to the children. As a general disability we may notice the

Thelusson Act, 39 & 40 Geo. III. cap. 98, which annuls every direction by will or other deed to accumulate annual proceeds of property for a longer time than until twenty-one years after the testator's death, or during the minority or respective minorities of a person or persons living at the testator's death. There is an exception of heritable property in Scotland from the operation of this Act, but the exception is repealed by the 41st section of the Entail Amendment Act, 11 & 12 Vict. cap. 36, so that the accumulation of the produce and profits of heritable and moveable property are now subject to the same restraint.

A testament must be probative. In execution by parties unable to write, we have seen that a privilege is extended to this class of deeds, so far as to sustain subscription by one notary and two witnesses. But, when the will is signed by the party himself it must be executed and completed with the same solemnities as other deeds; *Crichton*, M. 15,952. 12th January 1802. Here a testamentary deed, not holograph, and not containing the name of the writer or designation of the witnesses, was held improbate and insufficient to convey moveables. In *Dundas v. Lewis*, 13th May 1807, a trust-deed directed payment of such legacies as the testatrix might leave by "a writing under her hand." This was held to require a probative writing, and an improbate codicil was disallowed. The Court afterwards applied the same principle in *Buchan & Inglis v. Harper*, 27th May 1828, where the settlement was subject to bequests "in a letter signed by me of this date," which letter was, however, improbate. But the House of Lords, 18th October 1831, held, that the reference to the letter in the probative deed was sufficient to support it, upon evidence being adduced that the letter founded on was truly the letter mentioned in the deed. The improbate document thus stood by virtue of the reference to it in the probative deed, but without that support it would not have availed. A mutual will by husband and wife in the handwriting of the husband is effectual as regards his property, though not probative *quoad* the wife; *M'Millan v. M'Millan*, 28th November 1850. There, upon the fly-leaf of a Bible, a husband and wife made "this agreement, that the longest liver is to have all that remains after payment of our debts." It was holograph of the hus-

PART II.
CHAPTER IX.
RULE *si sine liberis*.

See *infra*, p. 480.

Thelusson Act,
39 & 40 Geo.
III. c. 98.

TESTAMENT
MUST BE PROBATIVE.

Hume, 917.

6 S. 864.

5 Wil. & Sh.
App. 785.

13 D. 188.

- PART II.
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- 12 D. 143. band, and was held good as a settlement of his succession. The doctrine that a will must be probative, is subject, as in the case of other deeds, to the qualification, that those interested to set it aside may exclude themselves from pleading the want of the solemnities by homologation or *rei interventus*; *Pollock v. Pollock*, 20th November 1849. There, a will was contained in a letter from a father to his two sons. An agreement to its terms was subscribed by the sons, who took possession. The survivor of them was subjected in implement to a sister favoured in the will.
- MERE INTENTION TO DEVISE IS INSUFFICIENT. In order to receive effect, a deed or writing conveying moveable property *mortis causa* must not only be probative, but it must be a completed act, and not merely an expressed intention to make a will in specified terms. The writing must import, that the granter does it, not that he intends to do it. This important doctrine was settled by the House of Lords in *Munro v. Coutts*, 7th July 1813. There, a paper signed and subscribed by a party as his codicil, but sent to his agent to make out a formal codicil, was sustained by the Court of Session as a codicil, but the decision was reversed. Upon the same principle, holograph signed instructions to prepare a settlement were decided not to have the effect of a testament, in *Staintons v. Stainton's Trustees*, 17th January 1828; and, where a testator had approved of drafts of new settlements, but died without executing them, the Court would not allow the drafts to be looked at in order to control the executed deed, which came into effect; *Duguid v. Dundas*, 8th February 1839. On the other hand, after the deed has been made, it alone is the evidence of the party's intention, and the instructions cannot be admitted to control that final expression of his will; *Blair v. Blair*, 16th November 1849.
- 1 Dow's App. 437.
- 6 S. 363.
- 1 D. 473.
- 12 D. 97.
- TESTAMENT MAY BE MADE *in articulo mortis*.
- POWER OF REVOCATION.
- M. 15,949.
- 4 S. 822.
- 5 D. 224.
- A testament may be made in the last moments of life, provided the testator be then of sound mind, and have a clear intelligence of what he is doing. But, at whatever period of life it may be made, it takes effect only at the testator's death; and, as it is held to express his mind as at his death, so he may revoke it at any time before that event; and so strong is this principle, that the right of revocation continues, even though it may have been renounced; *Dougall's Trustees v. Dougall*, 25th February 1789. The will here discharged a debt with absolute warrandice of the discharge, which implied a renunciation of the power of revocation; but the discharge was held to be effectually revoked by a subsequent writing. Nor does delivery bar the power to revoke; *Miller v. Dickson*, 11th July 1826. Here it was found competent to revoke a settlement granted in consideration of many favours under reservation of the granter's liferent, although it had been delivered to the grantee. In *Trotter v. Trotter*, 1st December 1842, a legacy bequeathed by a letter delivered was effectually revoked in a subsequent testament. But, as expressed

intention does not make a will, so neither will it revoke one, and the clearest evidence of intention to revoke will not affect the deed, if revocation do not actually take place. In *Walkers v. Steele*, 16th December 1825, the party had asked his agent for the settlement, in order to cancel it. Through unintentional delay on the agent's part it was not given back, and remained uncanceled at the party's death; but these circumstances were held to form no ground of reduction. On the other hand, when there is a clear revocation it will receive effect, though the party's settlements may thereby become incomplete, so that he shall die partly testate and partly intestate, and, although the revocation may be contained in a deed not strictly testamentary; *Lawrie's Trustees v. Lawries*, 12th July 1843. An exception to the power of revocation has been recognised in the case of a mutual will, which Lord FULLERTON observes, in the case of *M'Millan, supra*, has this consequence, that it is not merely a declaration of intention, but an obligation not to revoke; "it is a sort of contract." From the power of revocation and the peculiar character of the will as the *sententia voluntatis* of the testator at the very point of death, it results, that, when there are several testaments by the same party, it is the last only that receives effect, and hence it is called the *last* or *latter will*. When the last will is revoked, the revocation revives a previous one, if still existing; *Doves v. Smith*, 31st May 1827. Here a disposition of farm stock was revoked, the disponent declaring it to be his wish, that the stock should form part of his executry, and be regulated by the general law of moveables in its appropriation. The property was in consequence held subject to distribution, not as if *ab intestato*, but under the provisions of a will previously executed in America.

But, while it is the last will which prevails, that does not render it necessary that the whole of the testator's will be contained in one deed. Previous deeds and writings will also receive effect, wherever it is shewn, that the whole intention of the party in the disposal of his property will not receive effect, unless these writings, as well as that of the latest date, are allowed to operate; *Grant v. Stoddart*, 27th February 1849, affirmed 28th June 1852. Looking to the liability to mistake and misapprehension, which may arise where a party's will is contained in various deeds, it is proper, and has been noticed in the highest Court as a professional rule, always to inquire when called upon to prepare a settlement, whether there is already any in existence, and, if there is, whether it is to be kept in force. As a general rule, when there are various writings and no revocation, effect will be given to the whole, provided the testament can be so executed; *Grant, supra*. (House of Lords.)

The testament is one of those deeds which effects its object by a conventional form, and not by words of conveyance. Its peculiar characteristic is the nomination of an executor—that is, a person to

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4 S. 323.

POWER OF REVOCATION OF TESTAMENT, cont'd.

5 D. 1346.

13 D. 188.

5 S. 734.

WILL CONTAINED IN SEVERAL DEEDS.

11 D. 860.

1 Macq. App. 163.

PECULIAR FORM OF LAST WILL.

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CHAPTER IX.

WHERE DEED
CONTAINS NO
NOMINATION OF
EXECUTOR.

EXECUTOR—
WHEN *hæres*
fiduciarius.

M. 4619.
12 S. 413.

TESTAMENT
CONVEYS ONLY
MOVEABLES.
F. C.

16 S. 1017.

EXECUTOR'S
THIRD.

1617, c. 14.

F. C.
12 D. 201.
1 Macq. App.
178.

execute the will of the deceased by collecting his moveable property, and administering it for the benefit of all parties interested. It is the nomination of an executor, which constitutes a complete testament; and it is effectual as a conveyance of the moveable property to the party named executor, whether the property shall be distributed—that is, given beneficially, to legatees, or not. The estate may be disposed of without naming an executor, and, although a deed to that effect will want the peculiar character of the testament, it will be practically effectual, the omission to nominate an executor being supplied by the Judge in the proper Court. When the executor is appointed without directions how to dispose of the property, the testament is complete, and the executor in that case is in law *hæres fiduciarius*, a trustee for all concerned, the testament carrying to him the right of the deceased's whole moveables, wherever they may be, it being fixed law, that the personal succession is regulated by the *lex domicilii*. See the case, already cited, of *Hog v. Hog*, 7th June 1791; and reference may also be made to *Hyslop v. Maxwell's Trustees*, 11th February 1834, where a conveyance of the whole means and estate, heritable and moveable, which should belong to the testatrix at her death, was held to constitute a good testament of all she possessed at its date, and should afterwards acquire; and the same settlement was held also to be a valid exercise of a power, arising to her after the date of the deed, to dispose of a sum of £2000 at her death.

It is only moveables, however, that the testament does convey. It cannot be used to transfer or burden heritage; *Govan v. Setons*, 8th January 1812; or even to transfer debts originally moveable, but secured by adjudication, or other heritable security; *Crawfurd or Stewart v. Earl of Dundonald*, 22d May 1838. Here a testament specifying sums of money, goods, gear, and effects, was found insufficient to convey bills secured by adjudication.

A stranger executor, who is not named a legatee, or otherwise vested with the beneficial interest in the property, is, as we have seen, *hæres fiduciarius*; and formerly it was the practice of executors in that position to appropriate the whole estate to themselves, until, by the Act 1617, c. 14, they were required to account to the wife and children of the deceased, or to his next of kin according to law, retaining one third part of the estate for their own trouble. This Act is not in desuetude, and was acted upon, to the effect of allowing a third to the executor, in the case of *Nasmyth v. Hare*, 17th February 1819; and again in *Grant v. Murrays*, 28th November 1849, affirmed 28th June 1852. The Court of Session report has a foot-note containing a detailed report of the case of *Nasmyth*.*

* By 18 Vict. c. 23, § 8, so much of the Act 1617, c. 14, "as allows executors nominate "to retain to their own use a third of the dead's part in accounting for the moveable estate "of the deceased, is hereby repealed, and executors nominate shall, as such, have no right to "any part of said estate."

When the person named is appointed not only executor, but universal legatee or legatary,* he then holds the estate, not in trust, but for his own benefit, these words importing an absolute bequest of the deceased's whole moveable property to the executor. When it is not intended that the executor shall have a beneficial interest, care must be taken to avoid expressions which may, notwithstanding, confer such an interest. In *Beizly v. Napier*, 1st February 1739, M. 6591. after naming the executor the testator added, "I hereby debar and seclude all "others from any right or interest in my said "executry." These words were held equivalent to an appointment as universal legatary, and, therefore, to give the whole estate to the executor.

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EXECUTOR,
WHEN UNIVER-
SAL LEGATARY.

It is a frequent and convenient form of the testament to constitute the executor universal legatary, and burden him with the payment of debts, and of such legacies as may be specified. He is thus virtually named residuary legatee.

The testament is effectual, although the executor may not accept. This rule has been frequently applied to trustees, in whose case the principle is the same; *Forbes v. Earl of Galloway's Trustees*, 2d February 1808, affirmed on appeal. Here the trust was found to subsist, although one of the trustees named *sine quâ non* did not accept; and, in *Towart*, 14th May 1823, the only trustee being insolvent, and refusing to denude, the Court granted an application to have him interdicted from intromitting, and appointed a judicial factor to execute the trust.

TESTAMENT

EFFECTUAL,

THOUGH EXE-

CUTOR DO NOT

ACCEPT.

M. vocs "Soli-

"dum et pro

"ratâ," App^x.

No. 3.

2 S. 305.

Testamentary deeds receive a more liberal interpretation than others, the rule being that they shall receive that construction which carries the presumed intention of the testator into effect. Impossible conditions, therefore, and unintelligible expressions are held *pro non scriptis*, and ambiguities are interpreted according to the presumed will of the testator, if that is practicable by any construction. Where different deeds or codicils contain legacies to the same person, in such terms as leave it uncertain whether the last are in addition to, or inclusive of, the first, both are *in dubio* held to be due; *Clark or Hay, v. Hay's Trustees*, 16th May 1823. There was here an obligation to make certain provisions for a son's children in the son's marriage contract, and afterwards a legacy of £4000 in the obligant's will. Both the provision and legacy were held to be due; and the same decision was pronounced in *Sutherland v. Sutherland's Executors*, 22d November 1825, where there were two legacies in the same will, in such terms as to leave it doubtful whether the second was additional to the first, or included in it. The case of *Straton's Trustees v. Cunningham*, 10th March 1840, is to the same effect; and the principles of this doctrine were very carefully examined in *Horsbrugh v. Horsbrugh*, 12th January 1847, where four-

TESTAMENTS

LIBERALLY CON-

STRUCTED ACCOR-

DING TO PRE-

SUMED INTEN-

TION.

CONSTRUCTION

OF DOUBLE

LEGACIES.

2 S. 313.

4 S. 220.

2 D. 820.

9 D. 329.

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CHAPTER IX.

PAYMENTS
DURING TESTA-
TOR'S LIFE—
HOW INTER-
PRETED.

1 S. 346.

vol. ii. p. 432,
3d Edn.

teen cases of ambiguity in bequests were settled by the Court in accordance with the presumed intention of the testator.

Questions sometimes arise, whether payments made during the testator's life are to be held as in part of a legacy made to the same party; and these are resolved by the result of the inquiry, whether such payments were of the nature of donations, or whether, after being made, they remained upon the footing of a debt. See the case of *Mollison v. Buchanan*, 22d February 1822, affirmed on appeal, where, as there was an obligation to pay interest, the advance was held to have been in anticipation and in part of the legacy.

In the Juridical Styles there is given the form of the testament, which is sufficiently explained by the remarks already submitted.

Confirmation.—Although the testament confers upon the executor a complete available right, it does not of itself necessarily invest him with the *jus exigendi*. In order to give him a complete active title, inferring an obligation upon the deceased's debtors to pay to him, there must, in addition to the general conveyance created by the testament, be a special right, vesting the particular articles of which recovery is sought. The general mode of completing this special title is CONFIRMATION, which is a Judicial sentence of the Commissary, authorizing the executor, after making inventory of the deceased's estate, to sue, recover, and administer the effects. When an executor has been named by the deceased, he is called the executor nominate, and the judicial completion of his title is called the confirmation of a *testament testamentary*. When the deceased has not made a nomination, the executor is appointed by the judge, whose sentence in that case is called the confirmation of a *testament dative*.

CONFIRMATION,
WHERE EXPEDIENT.

The process of confirmation is proper to the Ecclesiastical Court, and the bishops or their commissaries had formerly an interest, to the extent of one twentieth part, called quot of testaments, in all moveable estates. These fees were prohibited by statute in 1641 and 1661, and all compositions in respect of the confirmation of testaments were abolished by the recent statute of 4 Geo. IV. cap. 97, which now regulates the proceedings in the Commissary Courts. The testament must be confirmed in the commissariat where the deceased had his domicile at his death. By the 6th section of the statute just referred to, the previous commissariots were abolished, and every sheriffdom and stewartry now constitutes a commissariat, except that the Counties of Edinburgh, Haddington, and Linlithgow, remain the commissariat of Edinburgh. The Sheriffs are now the Commissaries, and their substitutes Commissaries-depute. It is from them, accordingly, that confirmation must be obtained; and, although the deceased may happen to die in a different sheriffdom from that of his ordinary residence, his domicile is not thereby altered in this respect, and the

process must still proceed before the Sheriff (as Commissary) of the county of his residence. When one dies abroad, his testament must be confirmed in Edinburgh, as the *commune forum*, unless he went intending to return, in which case the proper Court will be the commissariot where he last lived.

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Executors are confirmed according to a certain order of preference. The person named by the deceased is preferred before all others; *Grahame v. Bannerman*, 28th February 1822; then the universal legatary is preferred, although not named executor; *Earl of Craufurd v. Ure or Glasfurd*, 10th January 1755; after him, the next of kin; * M. 3818. then, the widow; next, creditors; and last of all, special legatees.

ORDER OF PREFERENCE TO OFFICE OF EXECUTOR.

Executors not nominate are called executors dative, because given by the Judge who appoints them. An executor nominate requires no decree of appointment, but only sentence of confirmation. The title of the executor dative comprises both the decree dative, and the sentence of confirmation. The form of procedure is by application of any one interested, upon which the commissary issues an edict, whereby intimation is made to all concerned to appear in Court nine days after publication to see executors decerned. The form will be found in Bell's system of the forms of deeds. The edict is published at the church-door of the parish of the deceased's domicile, and, if he died abroad *animo remanendi*, it must be executed at the Market Cross of Edinburgh upon Saturday, the old market day, and on Sunday at the parish church-door of St. Giles. After the *inducias* have elapsed, the edict is called in Court, and the office of executor conferred by decree-dative, which, if there be competition, is granted in favour of parties in the order which we have described. All executors not named by the testator must find security in the books of the commissary, that the funds of the deceased shall be made furthcoming to all parties having interest, as law will. Sentence of confirmation is always preceded by an inventory of the deceased's moveable estate, given up by the executor upon oath, and, after security is found, confirmation is granted. The executor's title consists of an act of Court, called the testament dative. It embodies the inventory, and there is subjoined the commissary's sentence, by which he constitutes and confirms the party executor dative, *quā* next in kin, or *quā* relict, or *quā* creditor, as the case may be, to the defunct, with power to intromit and uplift, grant discharges, and pursue, under provision that the executor shall make just count and reckoning, when legally required, and make the property furthcoming to those interested. The part of the procedure antecedent to the confirmation is, of course,

EXECUTORS DATIVE.

PROCEDURE IN CONFIRMATIONS.

V. p. 603.

SECURITY, WHEN REQUIRED FROM EXECUTORS.

INVENTORY.

* By the 1st section of 18 Vict. c. 23, which provides, that the issue of a predeceasing next of kin shall come in place of their parent in the succession of an intestate, it is further enacted, that the surviving next of kin claiming the office of executor shall have exclusive right thereto, in preference to the issue of any predeceasing next of kin, who, however, shall be entitled to confirmation if no next of kin compete for the office.

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unnecessary in the case of an executor nominate, who is confirmed, as a matter of course, upon producing the deed containing his appointment, and an inventory of the estate. The title of the executor nominate is called a testamentary.

CONFIRMATION
CONSTITUTES
THE EXECUTOR'S
TITLE.

Confirmation, in the absence of a special conveyance, is the executor's title, and the test of his right to recover the deceased's moveable estate. So, where a debt of £1000 was paid to an executrix who had only confirmed £20 of that debt, and she was subsequently found to have had no title to the office of executrix, the debtor was subjected in second payment to the party truly entitled of £980, being so much of the debt as had not been included in the title originally produced to him; *Buchanan v. Royal Bank of Scotland*, 30th November 1842. A debt paid to the defunct before his death cannot be confirmed, but his executor can competently grant such an assignation as the deceased was bound to grant, and such a conveyance effectually transmits the executor's licence to sue; *Magistrates of Wick v. Forbes*, 11th December 1849. The same case shews, that executors confirmed in Scotland, can competently be sued in Scotland, though some of their number are in England, without the necessity of founding jurisdiction, the executors being indissolubly united, and bound to account in Scotland. The practice is to give up in the inventory what it is believed can be recovered, and, when more is recovered, to give up an additional inventory, and pay additional duty. Therefore, the inadequacy of the stamp in the compensation to the full amount of a debt is no objection to a charge; *Brown v. Miller's Executrix*, 16th December 1853.

5 D. 211.

12 D. 299.

ADDITIONAL
INVENTORY.

16 D. 225.

By the 3d section of the Act 4 Geo. IV., a former practice of lodging partial inventories is corrected by a provision that, in every case but that of an executor creditor, the inventory shall contain the whole moveable estate of the deceased.

OFFICE OF EX-
ECUTOR IS PER-
SONAL.

The office of executor is personal, and does not descend to the executor's heirs—so, when one of several executors dies, the entire office accrues to the survivors, and it falls entirely upon the death of the last.

The amount of the inventory is the measure of the executor's responsibility, no executor being liable *ultra vires inventarii*.

CONFIRMATION
UNNECESSARY:—

1. TO GIVE
TITLE TO *ius re-
lictæ* AND
LEGITIM.
2. WHERE EX-
ECUTOR IN
POSSESSION.
3. WHERE SPE-
CIAL ASSIGNA-
TION BY DE-
CEASED.

There are various cases in which confirmation is not necessary:—

(1.) Where the right exists independently of the deceased as the *ius relictæ* and legitim. These rights are complete without confirmation.

(2.) Where the executor is already in possession, he needs no confirmation.

(3.) By the Act 1690, cap. 26, special assignations and dispositions made by the deceased, although not intimated or published during his life, are declared to be good and valid titles to possess,

pursue, and defend, although the money contained in them be not confirmed. This Act is construed to include special legacies, and an example of its application will be found in the case of *Lyle v. Falconer*, 5 D. 236. 2d December 1842, where, the claim under a depending submission being conveyed by a will, the legatee was found entitled to recover it without confirmation. The previous case of *Bell* is noted in Lord 9 S. 266. JEFFREY's interlocutor. Under the authority of this statute, it is common to make special assignations in testaments, or to include in an inventory the whole articles of which the moveable estate consists, and refer to the inventory in the testament as sufficient, and intended to supersede confirmation.

(4.) Confirmation is also unnecessary when the party who is debtor is willing to pay or deliver without requiring the executor to be confirmed. Thus a bond of corroboration obtained by the next of kin supersedes the necessity of confirmation; *Watson v. Marshall*, 19th June 1782. PART II.
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4. WHERE
DEBTOR WILL-
ING TO PAY.
M. 7009.

(5.) Confirmation is now also unnecessary to vest in the next of kin their right to shares of the deceased's property. Before the statute of 4 Geo. IV. cap. 97, it was otherwise, and, if one of the next of kin died before obtaining confirmation, his share lapsed to the exclusion of his own next of kin. But this was altered by the Act referred to, which enacted, that, if the next of kin die before confirmation is expedite, the right transmits to his or her representatives, to whom confirmation is in that case to be granted.* 5. TO VEST THE
RIGHT.

(6.) An executor may sue for a doubtful claim without incurring the expense of confirmation. Mr. Erskine speaks of a license to pursue. That is not now known in practice, and it is usual to specify the claim in the inventory, with an explanatory statement that it is not yet ascertained, and that it will be added in an eik to the inventory, if made good. The confirmation issued upon such an inventory is a sufficient title to pursue, or a special act of the Sheriff, as commissary, may be applied for as directed by Mr. Bell. In either case, and also if the suit is raised upon the decree-dative, which is understood likewise to confer a title to pursue, confirmation in all these cases must be expedite before extracting the decree. 6. TO ENABLE
PARTY TO SUE
FOR A DOUBT-
FUL CLAIM.
Inst. iii. 9, 39.
Vol. v. p. 604.

The executor being liable for the deceased's debts, the creditors have recourse against him, and, when no executor is confirmed, a creditor may obtain confirmation himself, of which, by the 4th section of the statute 4 Geo. IV., previous notice must be given in the Edinburgh Gazette. In this case alone the confirmation may be partial, the CONFIRMATION
OF EXECUTOR-
CREDITOR.

* This statute is not limited to the succession of intestates dying after its date, but regulates *intestate succession* from and after the passing of the Act. So, where the next of kin of a person who had died intestate before the passing of the Act, survived the passing of the Act, her rights as next of kin were held to transmit to her representatives, though she had died without expediting confirmation: *Cunningham v. Farie*, 15th January 1856.

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F. C.
PROCEDURE IN
CONFIRMATION
OF EXECUTOR-
CREDITOR.
CHARGE TO
CONFIRM.

statute allowing it to be limited to the amount of the debt or sum confirmed; but such partial confirmation carries no further right than to the sum which is actually confirmed; *Lee v. Donald or Jones*, 17th May 1816. In order to entitle a creditor to confirm, his debt must be constituted. Where it is not constituted, he may sue an executor confirmed; and, if there be no executor, then, by the Act 1695, cap. 41, the creditor may charge the deceased debtor's next of kin to confirm within twenty days, which charge will constitute a passive title against the person charged as if he were a vitious intromitter—that is, it will impose upon him an unlimited liability, unless he renounce the succession. If he renounce, the creditor may then proceed to constitute his debt against the *hereditas jacens* of the deceased debtor, and after obtaining decree, he is entitled to be decerned executor dative *quā* creditor, and so make his claim effectual against the deceased's moveable estate.

NUNCUPATIVE
LEGACIES.

II. LEGACIES.—A legacy is a donation of money or of corporeal moveables, to be paid or delivered from the estate of the legator after his death to the party favoured, who is called legatee or legatary. It is incompetent to appoint an executor verbally to any estate, however small, but nuncupative legacies—that is, legacies made orally, and without the intervention of writing—are valid to the extent of £100 Scots and no more, for the reason that no obligation for a larger sum than £100 Scots is provable by witnesses. But, if the executor has right to the residue, and have promised to the defunct to apply the estate in payment of legacies to certain persons, proof by his oath, that the deceased relied on his doing so is sufficient to give right to more than £100 Scots; *Hannah's Legatars v. Guthrie*, 17th June 1738. This is a trust, the purpose being proved by the trustee's oath.* A verbal legacy for a larger amount is good to the extent of £100 Scots, if the legatee choose so to restrict it; *Wallace v. Muir*, 7th July 1629.

M. 3837; 5 Br.
Supp. 203.

M. 1350.

LEGACY, HOW
CONSTITUTED.

Legacies may be contained in the party's testament, or in one or more codicils to it; but their validity does not depend either upon there being a testament, or upon its validity if there is one. This we

rocc, "Le-
gacy," No. 5.

16 D. 843.

* The oath of an executor cannot control the destination of property settled by written deed, unless, as in the case in the text, the executor have personally right to the succession. That case is also reported by *ELCHIES*, under the name of *Phin v. Guthrie*. But, when the party has no connexion with the estate, otherwise than officially as trustee or executor under a will which destines the property to third parties, no verbal instructions to him can control the destination, except to the extent of £100 Scots. Any other principle would render nugatory the established rule, that a written instrument is indispensable to a testamentary conveyance or bequest; *Forayth's Trustees v. McLean*, 18th January 1854.

have already seen in *Kemps v. Ferguson*, 2d March 1802, where a testament vitiated in the nomination of the executor was held effectual to convey a legacy bequeathed by it. The briefest expression of the testator's will is sufficient, if explicit, to constitute a legacy. Short memoranda upon a slip of paper, directing the disposal of the contents of a deposit receipt pinned to it, were sustained as sufficient legacies in *Panton v. Gillies*, 22d January 1824, where there was no description of the document further than "*this bill*." The case of *Melvin v. Nicol*, 20th May 1824, is to the same effect. If the testator shall state the ground upon which he gives the bequest, the legacy will not be annulled, although the ground so stated may be erroneous in point of fact, an adequate cause, or any cause, not being essential to the validity of a conveyance *mortis causæ*. Error in the narrative, therefore, will not vitiate, unless it be proved, that, if the testator had known the truth, he would not have left the legacy; *Grant v. Grant*, 8 D. 1077. 9th July 1846. See also the previous case of *Speirs v. Graham*, 8 S. 268. referred to in this report, 18th December 1829. Nor will a legacy be rendered invalid by an error in the name of the legatee, *dummodo constet de personâ*; *Keiller or Wedderspoon v. Thomson's Trustees*, 15th December 1824. Here a legacy was sustained, although both the Christian and the married name of the legatee were blundered, the Lords being satisfied that no other person than the claimant could be intended.* Here it is necessary to bear in mind the doctrine already noticed, that the expression of intention to make a testament will not suffice. Upon the same principle, the expression of intention *narrative* to leave a bequest will not constitute one, if it be not also done in terms which a Court of Law can sustain as carrying the intention into effect. But, where taking the whole deed together, effect could be given to the intention, such effect has been accorded, although apparently at variance with the operative clauses of the deed; *Grant v. Grant*, 1st March 1851.

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CHAPTER IX.
M. 16,949.

EFFECT OF
ERROR IN CAUSE
OF GRANTING.

EFFECT OF
ERROR IN
LEGATEE'S
NAME.
3 S. 396.

ERROR AS TO
OWNERSHIP
OF THING BE-
QUEATHED.

With regard to an error respecting the property of what is conveyed, which is termed *legatum rei alienæ*—when a testator bequeathes what belongs to another, if he knew that it was not his own, the bequest is valid, to the effect of obliging the executor to make it good; on the other hand, if he supposed that it was his own, the legacy is void, because it is presumed he would not have burdened his legal representative, had he known the truth.

Upon the same principle of giving the utmost effect to the testator's intention, a legacy of heritage will receive effect, provided the intention of the testator be clear, the error being only in the mode of

LEGACY OF
HERITAGE.

* A legacy to a defined class, e. g. "to all my creditors of whatever sums shall be necessary for making full payment of the balances remaining due to them, as the same shall be set forth in a list which I intend to leave," does not fail for want of such a list; *Sprot v. Pennycuik*, 12th June 1855. 17 D. 840.

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7 S. 241.
4 Wil. & Sh.
App. 460.

*Legatum
liberationis.*

M. 8108;
Bell's 8vo. cases,
302.

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LEGACIES.

M. 2322.

M. 2325.

M. 2303.

Hume, 267.

conveyance, and provided also that it is claimed as against a party taking benefit by deeds of the testator. This is under the doctrine of approbate and reprobate, the import of which is, that the same party is not permitted on the one hand to maintain the validity of a deed by taking benefit under it, and at the same time to repudiate it in another particular, so as to disappoint the testator's intention clearly expressed; *Dundas v. Dundas*, 14th January 1829; affirmed, 22d December 1830. The previous authorities are referred to in the report of this case.

The *legatum liberationis* is a legacy of what the legatee may be owing to the testator at his death, and it effectually frees the legatee of the sums which shall be in his hands at that time properly as debtor, but it will not give him a right to the testator's money, which he may happen to have merely as a hand in passing it, or in temporary deposit; *Graham v. Denniston*, 22d June 1792.

Legacies are divided into three classes—*universal*, *general*, and *special* :—

A universal legacy includes the whole moveable property of the deceased, excepting heirship moveables. We have seen, that the party receiving such a bequest is called universal legatary, and, if his right is burdened with legacies to others, he is the residuary legatee. But, in order that a legacy may be truly universal, it must be unqualified, and, if words of a restricted application are used, or particulars enumerated, the legacy will be measured by the extent of the terms so employed, and even, if general words be added, these will be interpreted to include things of the same sort as have already been specified by restricted or particular description. Thus a legacy of one's whole moveable goods and gear does not include cash, because the terms "goods and gear" apply by technical usage only to *corpora mobilia*, and do not include *nomina debitorum*; *Fraser v. Smith*, 9th July 1776. Here the words "all moveable goods and "gear" were held not to include a banker's promissory note. The same was ruled in *Earl of Fife v. Mackenzie*, 14th May 1795, where the expression was "moveable goods, gear, and effects." In *M'Nab v. Spittal*, 30th May 1797, a disposition of a house, with the whole plenishing and household furniture and every article of all sorts and descriptions contained in it, was held not to give the donee right to money or documents of debt found in the house; and, in *Dunbar's Trustees v. Dunbar*, 15th January 1808, a bequest in these terms, "all my plate and horses and moveables whatsoever, and all pay and "arrears of pay," was held not to include a bond for borrowed money. A universal legatee is of course liable, not only for the legacies with which he may be burdened, but for the testator's whole debts, in so far as they do not exceed the value of the moveable property. Where one bequeathed the *universitas* of his property, heritable and moveable,

to two brothers and a sister, forfeiting the share of any one of them who should challenge his will—one of the brothers (the heir-at-law) reduced the settlement, and so forfeited his third. It was held, that the forfeited share accresced to the two remaining disponees, and did not fall to be divided among the next of kin as intestate succession, because such accretion was necessary to give effect to the testator's intention ; *Nisbet's Trustees v. Nisbet*, 6th December 1851.

14 D. 146.

A general legacy is that which bestows a sum without designating any particular fund from which it is to be paid. It does not, therefore, give to the legatee any real right. He cannot take direct possession, as a universal legatee can, of the whole estate when there is no executor, or a special legatee of the particular thing or fund bequeathed to him. The right conferred by a general legacy is a claim or right of action against the executor, who will be forced to pay, if he have sufficient funds arising from the estate after deduction of debts. As the general legacy is a burden upon the whole estate, it must suffer an abatement in proportion with other legacies of the same nature, should there be a deficiency of funds to satisfy the whole after payment of debts and expenses.

GENERAL
LEGACIES.

A special legacy is a bequest of a particular fund or article, so specified as to distinguish it from the rest of the testator's moveable estate. It operates, therefore, as a conveyance to the legatee, whose right by virtue of the legacy is complete, so that he, and not the executor, is the proper party to claim and recover it ; *Gray v. Cockburn*, 27th December 1711. Here a special legatee was held entitled, in preference to the executor, to do diligence for the contents of a bond bequeathed to him. A special legatee, therefore, has a preference over the fund bequeathed to him, and suffers no abatement, though there be a deficiency of funds to satisfy the general legacies ; *The Breadalbane Trustees v. Duchess of Buckingham*, 26th May 1842. Here a bequest of the free proceeds of certain estates was held to be a special legacy, and not liable to be encroached upon for the payment of annuities bequeathed, to liquidate which the testator had left other funds of sufficient amount. Where, however, the annual proceeds of the testator's whole property are bequeathed, that is not a special legacy, and it is subject to deduction of other annual payments devised by the testator ; *Currie v. Threshie*, 4th July 1846. The special legacy, however, is liable for the testator's debts, because no one can make gratuitous bequests to the prejudice of his creditors ; and on that account, when the special legatee institutes an action to recover the fund or article bequeathed to him, the executor must be made a party to the suit, in order that it may appear, whether the testator's debts are sufficiently provided for by funds exclusive of the special legacy. This legacy, like all others, may be revoked, but it is not presumed to be revoked by a posterior general disposition or

SPECIAL
LEGACIES.

M. 8062.

4 D. 1259.

8 D. 1021.

SPECIAL
LEGACY NOT RE-
VOKED BY GENE-
RAL SETTLE-
MENT.

- PART II.** settlement of the testator's property, such general conveyance being held to be granted under burden of the legacy ; *Thomson v. Lyell*, 18th November 1836. But, if the subject bequeathed perish, or is extinguished, the legacy is lost, unless an equivalent be provided, or the executor directed to make it up ; *Pagan or Plomer v. Pagan*, 26th January 1838. Here a bequest of £1000 was held to be annulled or adeemed—that is, taken away—the bond having been paid by the spontaneous act of the debtor during the testator's life ; and on the same principle, a house having been sold by the testator, after he had disposed of it *mortis causa*, the legatee was unsuccessful in claiming the price as a *surrogatum* ; *Chalmers v. Chalmers*, 19th November 1851.
- CHAPTER IX.** 15 S. 32.
- IF SUBJECT PERISH.** 16 S. 383.
- IMPLIED REVOCATION OF SPECIAL LEGACY.** 14 D. 57.
- A special legacy of a moveable bond is revoked by implication, if an heritable bond shall afterwards be taken by the testator for the same debt, unless the testator shall expressly direct, that this effect shall not take place ; and there is also implied revocation of a legacy bequeathed out of a certain subject, if that subject be afterwards sold ; *Paul v. Paul's Trustees*, 5th July 1821.
- 1 S. 100.
- SPECIAL LEGACY OF free, OR clear, SUM.** 15 D. 373.
- The use of the words “ free ” or “ clear,” as descriptive of a legacy, is now held to produce the important effect of relieving the legatee of legacy duty, either epithet being held to import an intention on the testator's part to impose that burden upon the rest of his estate. It was so decided in the case of a “ free yearly annuity ; ” *Bullock v. Beaton*, 8th February 1853 ; and, according to the English authorities upon which this decision proceeded, the word “ clear ” has the same effect as “ free.”
- CONDITION MUST BE PURIFIED.** *Conditional Legacies.*—When conditions are attached to legacies, these must be purified—that is, the stipulations which they contain must be fulfilled, because the ground upon which the bequest depends does not otherwise exist. Thus a legacy granted in contemplation of services to be performed is conditional upon the performance ; *Henderson v. Stuart*, 13th December 1825. Here one sum of £500 was left to a party on the ground of friendship, and another sum of £105 to the same person, as a recompense for managing the testator's testamentary affairs, for which he was named a trustee. The legatee having declined to act, he was found not entitled to the second legacy, and to the first only by a majority of the Court, as it had been left to him under the description of trustee ; and, in *Stevenson v. Macintyre*, 30th June 1826, shares of the residue of an estate were directed to be payable in liferent, provided no sister of the testator should appear and claim within five years, and they were held to lapse by the death of the legatee, appointed to receive the liferent, before the end of the five years.
- 4 S. 306.
- 4 S. 776.
- Survivance is an implied condition of a legacy. When a legatee

dies, therefore, before the testator, the legacy becomes void, because the presumed cause of granting is regard to the legatee himself; *Rutherfords v. Turnbull*, 30th May 1821. Here property having been bequeathed by a brother to his three sisters, the share of one of them lapsed by her predecease. From this doctrine that a legacy lapses, unless the legatee survives the testator, it follows, that the executors or other representatives of the legatee can have no claim to the legacy, for they can only claim as representing the legatee, but no right transmits to representatives, which was not vested in him whom they represent. Hence it follows, that a legatee cannot assign before the testator's death, as we have already seen in the case of *Bedwells and Yates v. Tod*, 2d December 1819; and the same principle is shewn by the case of *Glendinning and Gaunt v. Walker*, 30th November 1825, where, a legatee having died before the term of payment, the legacy became payable to his children, and it was found that his creditors could not claim it, because it had never vested in him, and the children took, not as representing him, but as conditional institutes. But, if the legatee survive the testator, the legacy vests *a morte testatoris*, and, if not received by him, it goes to his representatives, although his heirs may not have been mentioned. The rule is the same with respect to a legacy left to one person in *liferent* and another in *fee*. If the legatee to whom the *fee* is destined, and who is called the *fiar*, survive the testator, the *fee* vests in him immediately, and descends to his representatives by his will or by the act of the law, although he may die before the *liferenter*. So it was expressly found in *Turnbull v. Turnbull*, 28th July 1778; and, in *Forbes v. Luckie*, 26th January 1838, it was held to be clear, as a general rule, that, where a testator leaves funds to one in *liferent* and to another in *fee*, the *fee* will not be prevented from immediately vesting by the mere circumstance that the period of paying to the *fiar* is postponed till after the death of the *liferenter*. Other authorities to the same effect are referred to in this report. In *Cochrane v. Cochrane's Executors*, 29th November 1854, a testator appointed his trustees to pay a sum of £150, and a portion of his residue, to "John Cochrane or his heirs" six months after his decease, and "when the same is free from the *liferent* of my said spouse." The Court held, that the special legacy and share of residue vested in John Cochrane by his survivance of the testator, and were transmissible by his will, although he predeceased the *liferenter*.* But,

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1 S. 37.

LEGATEE MUST
SURVIVE TESTATOR.

F. C.

4 S. 237.

LEGACIES, AS A
GENERAL RULE,
VEST *a morte*
testatoris.

M. 8099.

16 S. 374.

17 D. 103.

* In the case of *Newbigging v. Pursell*, 9th March 1853, a testator made over his estate to his nephew in trust for payment of debts, and certain annuities, and, after satisfying these annuities, for payment of the annual produce to the nephew himself during his life. "After executing the purposes of the trust," the free residue was declared to pertain and belong to the nephew and his heirs, whom failing to other parties. The nephew having predeceased some of the annuitants, it was held, that he had a vested interest prior to his death, and that the estate was conveyed by his settlement, the vesting of the *fee* not being suspended till

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11 D. 452. when it is clear from the terms of the bequest, that the testator did not intend to confer a vested right before the end of the *liferent*, the legacy does not vest previously; *Newton v. Thomson*, 27th January 1849. There the interest of a sum was directed to be paid to one during her life, and at her demise £500 "to be equally divided" "between my two nieces or the survivor of them." It was held clear, that one of the nieces, who died before the *liferentrix*, had no power to assign the half, which would have been payable had she survived. When a legacy is payable after the death of two persons it vests, if the legatee survive one of them; *Wallace v. Wallaces*, 28th January 1807. Here a legacy was left to A., payable at the death of the longest liver of the testator and his wife. A. survived the testator, but predeceased his wife, and the legacy was held to have vested. This is a decision of leading authority, and frequently referred to in the discussion of such cases. See also the case of *Sterling v. Baird's Trustees*, 12th November 1851. In the analogous case of *Johns or Mackenzie v. Monro's Trustees*, 29th November 1833, a legacy was bequeathed to A., payable at the first term after the expiry of twelve months from the death of the testator and B., with interest from the first term after the testator's death. The legatee survived the testator, but died before B. The legacy was held, looking especially at the direction that interest should accrue from the testator's death, to have vested upon that event, although the capital was not payable until the death of B. But, if expressions are used indicating an intention, that the legacy shall not vest, unless the legatee survive both parties, such expressions will suspend the vesting, as in the case of *Lawson v. Stewart*, 24th January 1826, where it was stipulated, that, in the event of the legatee's death before the survivor, his legacy
- LEGACY PAY-
ABLE AFTER
DEATH OF TWO
PERSONS.
M. voce
"Clause,"
App^r. No. 6.
- 14 D. 20.
12 S. 146.
4 S. 384.
- 2 Macq. App.
273.
SUPPORT OF
THE VESTING IN
THE NEPHEW.
- 18 D. 971.
- the death of the annuitants. This decision was affirmed 10th May 1855, and the Judges in the Court of Appeal founded strongly, in support of the vesting in the nephew, on the facts, that the party, who was to have a beneficial interest, was made the trustee, and that personal obligations were imposed upon him in favour of annuitants, which proved that he was at once to have a fee, in order to answer those obligations. The Lord Chancellor (CRANWORTH) remarked, that, although the doctrine of suspension of vesting may certainly be made applicable to the case of an *annuity*, as well as to that of a *liferent*, it requires much stronger language to indicate an intention to suspend vesting in the former case than in that of a *liferent*. In the case of *Watson v. M'Dougall*, 3d June 1856, a testator appointed a *liferent* of his estate to his widow, and after her death appointed it to be divided among such of his nephews and nieces as should then be alive. By codicil he restricted his widow's right to an annuity, and directed his trustees to make an *interim* payment at a certain term after his death, "to my nephews and nieces then alive, and the children of such of them as may be dead;" the balance of the yearly produce after satisfying the widow's annuity, was also to be paid "to my said nephews and nieces and their children, as aforesaid." The residue the trustees were directed to pay at the wife's death "to and in favour of my said nephews and nieces or their children aforesaid, in the terms before directed." It was held, that the residue vested in such of the nephews and nieces as survived the term fixed for making the *interim* payment, and did not lapse by such nephews and nieces predeceasing the annuitant. It was a case of *morata solutio* merely for the convenience of the estate.

should fall or belong to his executors or next of kin; the legatee having predeceased the survivor, it was held not to have vested, and not, therefore, to be claimable by his creditors, but payable to his executor as conditional institute. The testator's intention, that the legacy shall vest, though not expressly stated, may be indicated by powers conferred on the legatee, as, for instance, the faculty to test or assign. Where such powers are conferred, to all intents and purposes the legacy vests, unless there be a clear expression of intention that it shall not vest; *Clark's Executors v. Paterson*, 5th 14 D. 141. December 1851.

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The effect of lapsing by predecease of the legatee is taken off, if the legacy is bequeathed to him, and his heirs or executors. When so conceived it is not evacuated by the legatee's death before that of the testator, but passes upon the testator's death to the legatee's next of kin not by virtue of any right derived from the legatee, for he never had any right to transmit, but in their own right as conditional institutes. This is shewn precisely by the case of *Henry v. Grant*, 19th February 1824. This decision shews likewise that the will of a legatee who predeceases the testator does not carry the legacy, because it was never vested in him. In the case of *Fyffe v. Fyffe*, 13th July 1841, a sum was bequeathed to A. B., with power to divide among his children, and, failing such division, to belong to the children. The legatee having predeceased the testator, the legacy was held to be vested in the children as conditional institutes.

LEGACY TO
PARTY AND HIS
HEIRS DOES NOT
LAPSE BY LEGA-
TEE'S PREDE-
CEASE.

From the authorities to which we have referred, it is evident that there is a clear difference as to vesting, between a legacy and a provision to a child. The provision lapses by the death of the child without issue before the granter, although conceived in favour of himself and his heirs and assignees, it being presumed, from the nature of the deed, that the provision is personal to the child, and that the substitution of heirs and assignees is conditional upon the provision becoming vested in him. On the contrary, when heirs are inserted in a legacy, that is not presumed to proceed from favour to the legatee, but from favour to the heirs themselves, and they are, therefore, held to be conditional institutes.

DIFFERENCE AS
TO VESTING BE-
TWEEN LEGA-
CIES AND PRO-
VISIONS TO
CHILDREN.

Dies incertus is held as a condition of a legacy when it attaches to the legacy itself; but it is often a question of difficulty, whether this condition does attach to the legacy itself, in which case it does not vest, or whether it attaches merely to the date of payment; for, if the latter be the construction, the legacy vests *a morte testatoris*, and is transmissible to the representatives of the legatee, the uncertainty of time attaching only to the date of payment. Every case is to be judged of by the terms used, as indicating the intention of the testator, which it has been said is the polar star by which the Court must be guided in construing a will. The decisions on this subject have

*Dies incertus
pro conditione
habetur.*

DOES THE CON-
DITION ATTACH
TO THE LEGACY,
OR TO THE DATE
OF PAYMENT?

- PART II.
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- M. 8105. been numerous, and, in some instances, apparently conflicting. Thus, in *Burnets v. Forbes*, 9th December 1783, £500 being left to A. B. "to be paid when he is sixteen years of age," the legacy was held to have vested *a morte testatoris*, although the legatee died before reaching the age of sixteen. This decision proceeded on the ground that the bequest itself was absolute, and the time specified only *modum solutionis causæ*; but, in *Omey v. M'Larty*, 19th November 1798, there was a legacy of £600, the interest to be paid to the legatee till his majority or marriage, when the principal was to be paid, and not sooner. The legatee having died before majority or marriage, the legacy was held to lapse. The more recent decisions are not without occasional difficulty in attempting to reconcile them with one unvarying principle, and we shall content ourselves with referring to such as may be held to be at present authoritative, and to require the Conveyancer's particular attention, as regulating the existing practice. Their general tendency is to hold the legacy as vested, and that uncertainty in the time attaches to the date of payment, unless the terms used be such as clearly to exclude the supposition that such was the testator's intention. In the case of *Fowke v. Duncans*, 1st March 1770, certain legacies were directed not to be paid until after the death of the testator's wife, and that was held not to suspend the vesting, but merely to be a direction as to the date of payment. In *Ralston v. Ralstons*, 8th July 1842, a legacy of £500 was left to A., and, in the event of his death, to B. and C., and the survivor, with interest from six months after the testator's death payable to their guardians, and the principal to A. *on attaining majority*, or, in the event of his decease, to B. and C., or survivor, *on attaining majority*. They survived the testator, but died in pupilarity. The legacy was held to have vested in A., and descended to his next of kin; and, in *Wilson v. Wilson*, 9th July 1842, a sum was bequeathed to two sons, with a provision that the interest should be paid to their mother during their minority, and the principal to themselves *only on attaining majority*. The legacy was held to vest, so that one of the sons who died in minority could bequeath his share. The two last cases were decided in different Divisions of the Court, and may be held conclusive with regard to the general rule already stated, that the presumption is in favour of the legacy being vested; and that an uncertain time, stated merely as a time, and not as a condition, refers only to the date of payment. On the other hand, in *Provan v. Provan*, 14th January 1840, and in *Johnston v. Johnston*, 9th June 1840, there was, in both cases, a trust, and the trustees were directed to pay an annuity, and after the annuitant's decease to uplift and divide the principal sum among the annuitant's children. This legacy was held not to vest in the children during the annuitant's life, altering Lord MONCREIFF's interlocutor in both cases. The points to be remarked here are, that there
- M. 6340.
- M. 8092.
- 4 D. 1496.
- 4 D. 1503.
- PRESUMPTION
IN FAVOUR OF
VESTING.
- 2 D. 298.
- 2 D. 1038.

was a trust, whereby the fee might be held vested in the trustees, and that the direction of payment to the legatees presupposed the expiration of the annuity. It was in the one case "*after the annuitant's decease to uplift and divide*," and in the other "*six months after the death of the annuitant to pay*;" and it was held, that there was thus no room to presume an intention upon the part of the testator to give a fee to the children before the expiration of the annuities. In *Johnston*, the circumstance of the sum being given to the children as a class, and not *nominatim*, was considered important, as indicating, in conjunction with the direction to divide six months after the annuitant's death, that the testator did not intend the shares to vest before the term of division. In both these cases allusion was made to a rule which had been held by Lord MONCREIFF and Lord COREHOUSE to furnish a principle for deciding such destinations. It was supposed, that, wherever the destination did not stop with the name of the person appointed to the fee, but added a substitution of heirs or other persons, (which is called a destination over,) then the fee did not vest until the term of payment; but that, whenever there was no destination over, then the fee vested immediately. This was the ground of Lord MONCREIFF's judgment in both these cases. But it was not entertained by the late Lord President BOYLE and the other Judges then in the Second Division, who held, that the general rule of regard to the testator's intention was not qualified by the principle referred to, although the fact of there being a destination over or not would form an element to be considered in construing intention.

DESTINATIONS
OVER.

In legacies to children and grandchildren, where the heirs or issue of the legatee are not mentioned, there is a presumption of *pietas paterna*, which gives the bequest to the issue of the legatee, although not named. The testator is held to have intended, although he does not say so, that if the legatee first named left issue, they should come in place of their father; and any substitution to a third party, therefore, is held to be made under the implied condition, *si sine liberis decesserit*—i.e., that the substitution is to take effect only in the event of the son or grandson dying without issue. Distinct examples of the operation of this principle are presented in *Marquis of Montrose* M. 6398. v. *Robertson*, 21st November 1738, and in *Neilson v. Baillie*, 4th June 1 S. 458. 1822. Recently the rule has been extended to relatives in the collateral degree, as in *Christie v. Patersons*, 5th July 1822, where it was 1 S. 543. held to give right to the issue of a predeceasing cousin-german. Formerly it was held, that, if issue should exist after the date of the settlement, and before the death of the testator, that circumstance should suffice to exclude the condition. This, however, was not regarded *per se* as conclusive in the cases of *Marquis of Montrose* and of *Neilson*, already cited, and there are important observations on this point in the report of the appeal in the case of *Dixon*, where it was decided that,

Conditio si sine
liberis IN CASES
OF SUBSTITU-
TION.See *supra*, p.
461.

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14 D. 938.

2 Rob. App. 1.

LEGACIES TO
MORE THAN ONE
PERSON—
EFFECT OF.

1 D. 94.

M. 8101.

10 S. 597.

if the parent be named, although he have issue when the bequest is made, and no reference be made to his children, still the rule *si sine liberis* gives the succession to them; *Dixon v. Broun or Dixon*, 10th June 1836, affirmed 9th February 1841.

When a legacy is given to two persons, the effect depends upon the terms used. If it be given to them *jointly* the shares are equal, and, in case of the death of one, the whole accrues to the survivor, because by the terms of the bequest the whole is given to each. So, in *Tullochs v. Welsh*, 23d November 1838, a sum being given to A. and B. in liferent during all the days of their lives, on the death of one of them the whole liferent was held to belong to the survivor, because bequeathed without severance or partition. On the other hand, when the legacy is to two persons *equally between them*, or a *half to each*, the share of one who predeceases will lapse, because by the terms used, no more than a half is given to each; *Rose v. Roses*, 15th January 1782; *Torrie v. Munsie*, 31st May 1832.

IN LEGACIES,
SUBSTITUTES
ARE GENERALLY
CONDITIONAL
INSTITUTES.

Substitution in Legacies.—It is unnecessary to repeat here the rules, which have already been explained on the subject of substitution and conditional institution. Substitution in a legacy is the nomination of another person to receive it, if the legatee fail—that is, if he predecease the testator. In a legacy to A., whom failing to B., A. is the institute, and B. is in ordinary language the substitute. But he is not a substitute in the strict legal acceptation of that term, because if A. survive the testator, the right of B. is at an end. It is only, therefore, in the contingency of A. predeceasing the testator, that B. acquires a substantial interest, and then he takes not as substitute, but as conditional institute. Thus, if the institute take the legacy, the substitute's right is completely evacuated. Of this there is a strong example in *Fyffe v. Fyffe*, 13th July 1841, where £500 was bequeathed to A., to be under the management of B. and C. for his behoof, and in the event of A.'s death to belong to B. and C. At the date of the bequest, A., the institute, was insane, but he survived the testator, and the legacy was held to have vested, and to be effectually conveyed by his testament executed before insanity, the interest of B. and C. being at an end by his mere survivance of the testator. And so completely does the substitute's interest vanish by the institute's survivance, that the fund bequeathed must at the testator's death be conveyed absolutely to the institute, without any notice of the substitutes; *Allans v. Fleming*, 20th June 1845.

3 D. 1207.

7 D. 908.

F. C.

A proper and effectual substitution may be created by appointing trustees to administer the fund to and for behoof of the legatee and substitutes in succession. Of this there is an example in *Duncan, Gardner, and Balmain v. Myles, &c.*, 27th June 1809; but the trus-

tees must be specially authorized for this purpose. The appointment of executors of the will generally does not constitute a trust effectual to prevent the legacy vesting in the person first called; *Williamson v. Cochran*, 28th June 1828; and, in *Alexander v. Alexander*, 13th December 1849, a direction that the share of a daughter should be invested upon heritable security or in the public funds, that she might receive the interest, her children to be her heirs, was held insufficient to create a trust, and, from the terms used, the fee was found to be in the daughter.

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SUBSTITUTION
BY MEANS OF
TRUST.
6 S. 1035.
12 D. 345.

But, while the received rule is such as has been stated, there are decisions which it is difficult to reconcile with it. In *Campbell v. Campbell*, 17th February 1743, Daniel Campbell, by a will made at sea, bequeathed all his money and effects to his father, and, in case of his father's decease, to his sister. The father survived the son, but died the month after, ignorant of his son's will, and leaving a general disposition in favour of his three children, executed five years before. The surviving son pleaded, that the substitution by Daniel of the sister was only a conditional institution, and that the father having survived Daniel, the property had vested in the father, and was carried by his settlement. The Court of Session, however, and the House of Lords held, that the substitution in favour of the sister continued to subsist notwithstanding the survivance of the father, and was not evacuated by the father's general disposition, executed several years before the will. The father's ignorance of the son's death and will was here held to exclude the idea that he intended to convey the son's property by his own settlement.

1 Cr. and St.
App. 343.

Again, in the case of *Annandale v. Macniven*, 9th June 1847, there is an example of a father directing his trustees, failing both his daughters, to pay the residue to A. B., &c.—and of this being held a *proper* substitution, giving the right to A. B., &c., though one daughter survived. But she had predeceased the term of payment mentioned by the testator.

9 D. 1201.

PART III.

THE WRITINGS EMPLOYED IN THE CONSTITUTION, TRANSMISSION, AND
EXTINCTION OF HERITABLE RIGHTS.

CHAPTER I.

THE ORIGIN AND HISTORY OF THE FEUDAL SYSTEM—FEUDAL SYSTEM AS
MODIFIED IN SCOTLAND—ANCIENT MODE OF CONSTITUTING THE FEUDAL
RELATION.

PART III.

CHAPTER I.

IRRUPTIONS OF
THE BARBA-
RIANS INTO THE
TERRITORIES OF
ROME.

I. *Origin and history of feudal system.*—The feudal system in its mature form was the result of the confusion and changes which followed the overthrow of the Roman Empire. That great revolution was produced by the conflict of races opposed to each other by diversity of origin, habits, and character. The mountain chains which separate Spain, Italy, and Greece from the rest of Europe, formed the grand territorial limit between the civilized portion of the world and the barbarian tribes. That barrier was first surmounted by the Cimbri and Teutones from the north of Germany, whose inroads in the time of Marius alarmed even the capital; but they were checked by him and destroyed. Afterwards the discipline and prowess of Rome under Julius Cæsar subjugated Gaul, with part of Germany and Great Britain; and the fortune which smiled upon her arms made her the arbitress of nations from the Atlantic to the Euphrates. But even the annals of her conquests in their time of greatest success exhibit the beginnings of the process of irruption, which ended in her fall. The causes of that overwhelming invasion are to be found in the severity of the northern climate—the barbarity of the German tribes—their passion for war, and predatory habits—and the irresistible attraction which the inhabitants of rude and inhospitable regions found in the rich fields of Gaul and the sunny plains of Italy. The operation of these causes is strikingly displayed in the 31st chapter of the 1st book of Cæsar's Commentary *de bello Gallico*, where he describes a secret interview with a deputation from Gaul. They represented to him, that the whole nation was divided into two factions—that, after a protracted contest with each other, one of these factions,

CAUSES OF
THESE IRRUPT-
IONS.

the Arverni and Sequani, had at last called in the aid of German mercenaries, of whom accordingly about 15,000 had crossed the Rhine. But no sooner, they said, did these savages gaze upon the fields and wealth of the Gauls, than they became enamoured of them, and brought over more of their countrymen to the number in all of 120,000. Hence, what gained at first the pre-eminence for the Sequani eventually proved their ruin; for Ariovistus, a king of the Germans, settled in their territory, which was the richest in all Gaul, appropriated a third part of the land, and by and by demanded one of the remaining two-thirds for an expected tribe of his countrymen. This barbarian had so deeply impressed the minds of the Sequani by his power and cruelty, that the members of the deputation from that tribe could find no utterance for their abject misery, but hung their heads in mute remembrance of his savage ferocity. From this crushing tyranny the vanquished sought a refuge in the aid and milder rule of the civilized Empress of the World. Then we have the sagacious and prophetic anticipations of Cæsar, who, besides other motives for his interposition, perceived, that, if he did not interfere, the gradual influx of the Germans must prove a source of danger to the Roman power, since such hordes of savages after occupying the whole of Gaul would never be restrained from advancing into Provence, and thence into Italy.

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This contest was long protracted, and there is no period of history which presents features of greater interest. The combatants on one side are the tenants of those boundless regions sloping towards the north and east, which receive only the oblique rays of the sun tempered by their approach towards the arctic circle. Nor has the light of civilisation yet dawned here. Their virtues and habits are in some respects as stern as their climate. Their business is war, and, as they have no local attachment, there is no hindrance to the concentration of all their energies upon the effort to make the smiling regions of the south their own. On the other side, we have the great Arbitress of the World and Dispenser of civilisation—her people sprung from fields upon which the sun beats with a direct and genial glow—confident in the long possession of victory and power—and commanding not only her own proper resources, but those also of many provinces in the most favoured portions of the earth. The Roman was less hardy in person than his antagonist, by the influence of refinement, as well as of climate. Nevertheless, discipline and skill prevailed at first; but the influence of these could not be maintained permanently upon a wide frontier, and against the incessant supplies of new and hardy tribes, which issued from the forests of Germany, and were gradually pushed forward by restless bands from Scythia and the tracts stretching into Asia—that vast storehouse, which supplied successive nations to people Europe.

CHARACTER OF
THE BARBARIANS AND
ROMANS COMPARED.

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DEGENERACY
OF THE ROMANS.

Nor were these the most formidable enemies the Empire had to contend with. Those were to be found in the very heart and vitals of the state. The hardy virtues, and native force of mind by which the Roman power had been built up, ceased to grow after the establishment of the Empire. The subjection of public interests, and of all moral restraints, to the private objects of power, sapped the foundations of private virtue. The application of boundless wealth in practising the lessons of oriental magnificence and luxury hastened the prostration of principle; and thus the nourishment failed which alone could have sustained the vigour requisite to endure and repel the thickening onset of assailants, so numerous and powerful. In drawing the portrait of the Germans, TACITUS, in his *Germania*, has in reality painted in deep shade the Roman character also. Nor is there in the compass of literature a more interesting passage than this. The historian, who had, with a stern though agonizing fidelity, portrayed the atrocities of a Tiberius and a Nero, expresses in phrases of pregnant significancy the virtues of these rude barbarians; and, as in the Straits of Gibraltar sunken vessels are borne in a direction opposed to the surface tide, so in this dissertation there is implied in almost every virtuous trait of the barbarian character a deep undercurrent of indignant denunciation of the corruptions at home. It was the enormities of an Agrippina and a Messalina that filled his mind, when he extolled the severe observance among the Germans of the marriage vow, and described the punishment of faithlessness, after which there could be no attraction in beauty, youth, or riches; for there no one smiled at vice, nor was it reckoned fashionable to be the agent or object of corruption. It was the same horror which gave point to his distinction of punishments—public execution for open crimes—secret death for unnatural offences—*scelera ostendi—flagitia abscondi*. No direct invective could have expressed more strongly the mockery of good laws, where there was a total decay of principle, than the picture of the converse among the Germans, by whom usury was unknown, and, therefore, more securely avoided, than if it had been expressly forbidden, and for whom in their simplicity pure morals did more than the best code for others. It is a silent rebuke of the neglect of truth and faith, when he paints even the perverted morality of the savage, so eager at play, that, when he had lost all, he would hazard his liberty on the last throw, and become a slave, submitting, though younger and stronger than his opponent, to be bound and sold. The life of Agricola exhibits the same unceasing remembrance of the State's mortal disease; for the removal by poison of Germanicus, the glory and hope of the Empire, when his reputation had awakened the jealousy of Tiberius, was the idea present to the biographer's mind, when he rejoiced in the good fortune of Agricola, happily thrown upon

times when eminence was not regarded with an evil eye, and renown was not perilous. PART III.

When to the moral traits of the barbarians we add their physical condition and habits of life, (and this is conducive to our main design, in giving an idea of the spirit upon which the feudal system was reared,) we shall find these equally fatal to the Roman hopes. Born under a climate gloomy and severe, (which Tacitus regards as conclusive evidence that they were indigenous, since no one would leave any other part of the earth to settle in such a region,) they were inured from infancy to exposure and hardship. The introduction to manhood was the public gift of a shield and lance. Marriage presents were such as to nourish the military spirit, imparting its influence to the wife and mother, and so transmitting it to children and grandchildren. They knew neither the name nor the use of autumn, for they disregarded agriculture, leaving it to the females and infirm, and holding it inglorious to acquire by sweat the livelihood which they could gain by blood. It is recorded as ignominious to the Gothini, that they were miners of iron. Their houses were of the most abject rudeness, or they lived in holes of the earth; and, when Cæsar, after the interview to which we have already referred, sent a message to Ariovistus, that leader, to give an idea of the hardness of his followers, informed him in his reply that they had not been under a roof for fourteen years. War was their business and delight; and, when there was peace at home, the youth went to other tribes in quest of military adventure. CHAPTER I.
PHYSICAL QUALITIES OF THE BARBARIANS.

Such were the stern qualities of mind and body, before which the greatness of Rome was humbled. The first serious inroad was made by the Goths in the middle of the third century; and they advanced with various success during the next two centuries. In 451, the Huns from the north of China, who under Attila had penetrated into Europe, and overrun Gaul, Italy, and Greece, were repulsed. But the permanent result of the contest was the occupation of Spain by the Visigoths, Gaul by the Franks, the regions adjacent to the Rhone by the Burgundians, and Italy by the Ostrogoths. The Longobardi were a tribe of Vandals from the Elbe, who settled in the north of Italy. The invasion and occupation of Britain by the Saxons was a part of the same general change. SETTLEMENT OF THE BARBARIANS IN THE ROMAN EMPIRE.

The mind is disposed, after such a revolution, to give its attention wholly to the victors, and to ascribe to their conduct and influence exclusively all subsequent laws and events. But in this instance the vanquished were not exterminated. The barbarians left to them a portion of the land. From the laws of the Burgundians we learn, that they appropriated to themselves two-thirds of the land, and one-third of the slaves. The rest remained with the old inhabitants. The countries which we have THE VANQUISHED INHABITANTS NOT EXTERMINATED.

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named were thus occupied not only by the barbarian conquerors, but by the vanquished inhabitants also—who, by virtue of a constitution of Antoninus, conferring the privileges of citizenship upon every inhabitant of all the provinces, were called Romans—and by slaves, the property of both.

Leges Barbarorum.

The institutions and manners of this period are learned from the codes of the barbarian laws, which are extant, and form a singular record of an era in which ignorance, violence, and confusion, prevailed. There is the Burgundian code, which, from the greater intercourse of its authors with the Romans, is less rude than others, and milder towards the old inhabitants. There is the code of the Longobardi, from which our own feudal usages are thought to be chiefly derived; and, beside many others, there is the Salic code—the foundation of the law of succession which excludes females,—the “sal” or homestead, *i.e.*, the patrimonial estate, having gone always to the nearest male relative.

STYLES OF
MARCUFUS.

But equally instructive with the *leges barbarorum*, and possessing a more peculiar interest for the Conveyancer, is the work of Marcufus, exhibiting in its rude pages the germs of all or most of our forms of deeds. This remarkable compilation, which is printed along with the Barbarian Laws, is dedicated to Landericus, who was Bishop of Paris about the year 660. The preface shews that Marcufus was a monk, seventy years of age when he engaged in this labour; and it is interesting to find the author of a work destined to obtain an importance so remarkable and enduring, disqualify himself in these terms:—“My hand is now too tremulous to write, my eyes too dim to see, my mind too feeble to think.” It consists of two books, the first containing *Preceptiones Regales*, *i.e.*, Royal Precepts or Grants—and the other, *Chartæ Pagenses*, *i.e.*, the writs of villagers or subjects. It is in reality and literally a book of precedents, or, as we familiarly call them, *styles*, written in Latin the most barbarous and ungrammatical; but its rusticity is justly regarded as a pledge of genuineness, for every kind of learning was so entirely buried amid the surrounding barbarity, that an elegant style would have subjected the writer to the suspicion of magic; and Gregory of Tours, a well-known theologian, apologizes in the introduction of a historical work for errors in orthography, because he had never learned grammar.

These exemplars of deeds, in combination with the barbarian codes which they confirm and illustrate, reveal a condition of society and of rights, exactly corresponding to the diversity of origin and variety of habits and laws among the people who used them. The position of the ancient inhabitants, the representatives by descent or citizenship of the former conquerors of the soil, is in striking contrast to their ancient ascendancy, and the meet retribution of such excesses as Cæsar unconsciously attests, when he relates, that, having chased

the Aduatici into a town, he put up to auction the section of it in which they had taken refuge, and ascertained afterwards from the purchaser, that the lot contained 53,000 human beings. Now, in the dim light of these dreary centuries of oppression and ignorance, we behold the Roman shorn of the greatest part of his inheritance, yet permitted to occupy the remainder, and to adjust his rights in connexion with marriage, succession, the treatment and sale of his slaves, and other matters, according to the rules of his own law. Tolerated, but shut out from advancement and power, the conquered race seem to have dragged out an obscure existence, and to have paid the penalty of former excesses by long ages of degradation, accompanied by injury or neglect.

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The condition of society and of property appears from various portions of Marculfus's work. The mixture of races is shewn by the eighth formula of the first book, which is the grant of a jurisdiction enjoining the duke or count in whose favour it is made to administer equal justice to all the inhabitants, whether Franks, Romans, Burgundians, or of any other nation. The insecurity of life appears in the punishment for killing a man, which was a pecuniary fine, because capital punishment would have sacrificed a follower. The thirty-third formula indicates the general state of lawlessness and insecurity. It gives the terms of a precept for renewing instruments destroyed by hostile incursion, by violence, or by fire. The eighteenth formula of the second book exhibits the extent of the feudal power, being a bond of indemnity to one who has killed a man at the bidding of his chief. And, among several forms of vendition, we have the evidence of common and degraded servitude in the twenty-second formula of the same book, which is the sale of a male or female slave, the subject being warranted not to be a thief, or a runaway, or worthless.

CONDITION OF
SOCIETY IN THE
TIME OF MAR-
CULFUS.

The condition of property in land during the dark ages is, in a high degree, characteristic of the co-existent authority of diverse laws and customs. The genius of the system of land-rights derived from the barbarians was to concentrate the property of land for the sake of individual power and general security. The Roman laws and customs tended in the opposite direction, for they treated land in regard to succession, like moveables, dividing it among the whole members of a family. Alienation by sale or gift was also freely permitted, a power long denied by the feudal rules. Now, we have already seen, that the Romans were allowed the use of their own laws, and it is clear, that lands of considerable extent remained subject to the powers of absolute property and disposal, which distinguished their jurisprudence from that of the barbarians. A main distinction was, that the feudal lands were holden of a superior, while lands subject to the Roman law were free of all the conditions and fetters implied in that tenure, from which circumstances they were termed *allodial*. But the forms of

DISTINCTION
BETWEEN THE
LAWS OF THE
ROMANS AND
BARBARIANS AS
TO LAND-
RIGHTS.

ALLODIAL TEN-
URE.

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Marculfus concur with the codes in exhibiting lands held in both of these modes. The twelfth formula of the first book relates to the conveyance by a husband to his wife of certain properties, belonging to him "*aut munere regio*"—that is, by royal gift, which is the feudal tenure—"aut de alode parentum"—that is, property not feudal, inherited from his parents; and in like manner, the thirty-third formula, to which we have already referred, specifies not only lands held by royal grant, but those acquired by purchase, gift, and exchange, and those also inherited as allodial. Nor was allodial property confined to the old inhabitants. The barbarians also held lands by that title, whether obtained, as some suppose, by an absolute right in addition to the lands granted under the feudal conditions, or whether acquired by purchase, or other right, from the Romans. Thus the fortieth title of the Burgundian code empowers any barbarian who wishes to test or make a gift, to use either the Roman method or that of the barbarians. The greater part of lands, however, was, no doubt, held by that tenure which the conquerors had introduced, and which will best be understood by referring to its first roots in the habits of the Germanic tribes.

ORIGIN OF THE
FEUDAL TEN-
URE.

The occupation and disposal of the soil was originally made subservient to that military passion which we have already observed. The *dux* or *princeps* of the German *civitas*, the prototype of the feudal lord, was both the leader of his followers in war, and their magistrate in peace. His attendants were not picked up as chance presented them. They were members of the same or of neighbouring families, stimulated to daring by the dearest considerations, for they fought within hearing of the wailing voices of their children and wives, who were the most sacred witnesses and valued admirers of their exploits. The attendants upon the leader were called the *comites*, and among them the point of emulation was, who should have the place next his chief, while the chiefs strove which should have the most numerous and distinguished attendants. It was their dignity and their strength to be encompassed by a large band of chosen youths, their ornament in peace, their defence in war. These are the words of Tacitus, from whom also we learn, that, in the field, it was disgraceful to the chief to be surpassed in prowess, and disgraceful to his followers not to keep pace with the valour of their chief. He was infamous for life who survived the fight in which his chief had been slain, for their great oath was to defend and protect him, and to ascribe their own exploits to his glory. It was a necessary characteristic of such a society, that, while the members were compactly bound to each other, it was anti-social with respect to all others. Thus Cæsar says, that it was their pride to have a wide desert round their borders, and, according to Tacitus, this feeling descended even to individuals in the same tribe. He says,—They have no cities—they cannot endure a com-

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mon settlement ('*junctas sedes.*') They live separate, wherever a fountain, a field, or a grove, may take their fancy. In the villages their houses do not adjoin, but each has a space round it. It is from these sources that the feudal scheme is with the greatest probability deduced, not that they contained any exact pattern of its institutions, but rather as exhibiting circumstances naturally preparing the barbarians for the adoption of such a system. In the relation of patron and client among the Romans, some writers have found an origin more probable, and Niebuhr characterizes that relation as the feudal system in its noblest form. The grants made by some of the Emperors on condition of military service have also been referred to as its probable root. But those grants were allodial, and the connexion between patron and client was civil and not military.

The inherent character of the feudal tenure is a grant of land made voluntarily by a king or leader of his free favour, on the condition of fidelity in the grantee, and of military service. The oath of fealty—"fidelitatis sacramentum"—is found in the German source. The relation of the *dux* and *comites* was also, in its essential features, a precise model of the feudal dependency. It is true that, in Germany, the land was the absolute property of the community, and subject to individual right only during the annual appropriation. But a more extended tenure would naturally result from occupying a richer country, and from an advancing estimate of the value of land, and increased security of possession.

The researches of Mr. Hallam and M. Guizot have thrown some doubt upon the opinion, that feus were at first precarious, or revocable at the granter's pleasure. Sir Thomas Craig (who is followed by most other authorities) assumes that this was their primary character during the period which he terms the *infancy of feus*. The next stage was the grant during the vassal's life, which prevailed from the beginning of the seventh till the end of the eighth century, and is called by Craig the *childhood of feus*. Their *manhood* was attained under Charlemagne, when the example of the hereditary quality in allodial estates, the growing security of property, and the enhanced power and influence of the feudatories, prevailed in obtaining the right of succession to children and grandchildren in the direct line.

The feu exercised in its turn a reciprocal influence upon the allodial tenure. The advantage of the latter in being transmissible at pleasure was more than counterbalanced by the insecurity of possession in an age of violence. The feu was comparatively exempt from this danger, by the implied condition of the feudal contract, that, as the vassal was bound to do homage and give suit and service, so, on the other hand, the granter or superior was obliged to afford protection to his vassal. The allodial proprietor was also subject to severe social grievances. In public impositions the Roman was taxed in

INHERENT
CHARACTER OF
FEUDAL TEN-
URE.

FEUS ORIGI-
NALLY PRE-
CARIOUS;

NEXT, FOR
LIFE;

AFTERWARDS,
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MERGING OF
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double the amount levied from the Frank, and the old inhabitant was subjected for slight offences to trial by fire and water, which was imposed upon the barbarian only in cases of murder. In order to escape these hardships, the allodial land was gradually ceded to the powerful barons, who reissued it to the proprietors as a feudal estate; and so eventually all the property in France was converted into feus or fiefs. In England, after the Norman invasion also, the whole land in the kingdom was converted into proper feus. What was the precise nature of the Anglo-Saxon tenure then supplanted is a point of dispute. The causes which we have traced led also to the establishment of the feudal system in the other countries of Europe. In Scotland, there is no doubt that it took its place in the eleventh century, although it is a matter of controversy, whether in the year 1004, or at a later date, and after the Norman conquest.

JURISDICTION
OF FEUDAL
LORDS.

The influence of the Church in obtaining the renunciation of secular jurisdiction over her large properties is regarded as a main source of the independent civil and criminal jurisdiction of the feudal lords. Mr. Ross quotes a charter, dated in 811, whereby civil and criminal powers were conferred, and the Judges discharged from interference. Such a condition of rights afforded full scope to the ambition of powerful feudatories, and the whole kingdom of France fell into the hands of eight or nine barons, the strongest of whom, Hugh Capet, usurped the crown in 987.

*Consuetudines
feudorum.*

The habits and powers of the great crown vassals were imitated by those to whom they granted subordinate feus, and these sub-vassals had again dependants under themselves, all upon the condition of homage, military service, and other feudal liabilities. In this manner the characteristic feudal dependency of land was established, and various rules and customs were introduced from time to time for the settlement of differences between lords and their vassals in France, Italy, and Germany, where the system prevailed. These regulations varied in the different states, and there was no common Institute of the feudal law, until, in the twelfth century, it was compiled under the title *Consuetudines Feudorum*, its rules being drawn chiefly from the customs of the Lombards. This work, known also by the name of the Book of the Feus, is printed at the end of the *Corpus Juris Civilis*, along with which it was studied in the schools of law; and it obtained general regard as of high authority, although never entirely adopted by any one nation.

SOVEREIGN,
THE ORIGINAL
AND SUPREME
PROPRIETOR OF
LAND.

The grand feature of the system, which we have endeavoured to trace to its fountainhead, was, that it invested the sovereign with the character of original and supreme proprietor of all land subject to his dominion. By him territories were allotted to his more powerful subjects, who subdivided them among their dependants, and these in their turn made subordinate grants, which descended through succes-

sive grades to an extent commensurate with the exigencies of the military following down to its lowest rank. The property thus distributed was held upon various conditions, of which the fundamental one was fidelity, undertaken by the act of homage. The feudatory or vassal appeared in the court of his lord, and upon his knees, in presence of the other vassals of equal degree, vowed fealty in the words, "*Devenio vester homo*;" or, according to Littleton, laying his right hand upon a book, he said, "Know ye this, my lord, that I shall be faithful and true unto you, and faith to you shall bear for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do, at the terms assigned, so help me God and His saints." This oath created the peculiar ties and obligations which both parties regarded as their chief privilege and highest glory. The vassal, besides the general obligation of fidelity, undertook to attend his lord's court in peace, there to give counsel and execute judicial functions, and to follow his standard in war. Besides these services to the immediate feudal lord, there was implied in every feu the duty of allegiance to the sovereign, the lord paramount, which was paid through the medium of the intermediate lord's homage and obedience to the Crown. The superior, on the other hand, undertook the reciprocal engagement to protect his vassals. This principle of mutual obligation, descending through successive orders of subinfeudation, constituted a system singularly compacted and strong, uniting the interests and efforts of every one, from the Sovereign and his most powerful nobles down to their humblest dependants, in the defence of the soil which yielded sustenance to all, while it maintained a military retinue for the overlord, and thus secured protection to the vassals in their successive degrees.

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OATH OF
HOMAGE.

The interesting associations suggested by the Feudal system, when we contemplate the bond of mutual interest and protection which it was designed to cement and preserve, are much disturbed when our attention is called to the casualties, or, as they are termed, feudal incidents, which rendered the vassal's estate to a considerable extent precarious, and exposed it to the cupidity and rapacity of the chief. Of these incidents a minute and very interesting account is given by Mr. Hume in the second appendix to his History of England. We shall notice only such of them as are appropriate to our subject:—

FEUDAL INCIDENTS, OR
CASUALTIES.

The great feudal casualty was that of *Escheat*—the falling of the estate again into the lord's hands by forfeiture of the vassal's right. This took place when the vassal was guilty of a breach of feudal duty—as, for example, neglect or refusal to attend the superior's court, after being thrice summoned. The sale of his estate without the superior's consent, or upon a tenure different from his own, inferred forfeiture. The alienation of the feu was so high an offence, that, by the fifty-fifth title of the second book of the feus, the writer of a deed

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of alienation was to have his hand struck off. The commission of crimes, which by construction was held to be a want of fidelity, and also the direct breach of that duty by desertion in war or betrayal of trust, were also punishable by escheat.

FINE FOR
RENEWAL OF
FEU.

Upon the vassal's death, his heir could only obtain a renewal of the feu on payment of a fine, (a rule which still subsists.) And, if the heir was a minor, the superior, to compensate him for the want of a vassal of mature age, was entitled to the rents until the heir's majority, subject to such allowance as he might choose to grant for maintenance and education. This was the casualty of *Wardship*, a productive source of emolument to the Crown. When the vassal left no heir capable immediately or prospectively of performing the feudal services, the feu fell to the superior.

CASUALTY OF
WARDSHIP.

CASUALTY OF
MARRIAGE.

The casualty of *Marriage* was another of these incidents, singularly characteristic of the system and of the barbarous state of society. When the heir was a female, the lord was entitled to select for her a husband of suitable rank, and she could not refuse the party tendered without forfeiting either her property, or at least as much as was estimated to be the value of the match. A male heir also required the superior's consent to his marriage, and it was usual to pay large sums for liberty of choice. In the reign of Charles I., the Earl of Warwick, as having right to the wardship of an heiress, extorted £10,000 sterling for his consent to her marrying a husband in every respect suitable.

EVIL CONSEQUENCES
RESULTING FROM
FEUDAL SYSTEM.

Such was the feudal system in its most prominent features. As a political institution, it will not bear to be examined by modern tests or ideas. But we are to remember, that no judgment of any system can be just, unless it have a regard to its period and circumstances. At the same time it is impossible to shut our eyes to the magnitude of the evils which the feudal scheme involved. The primary object being security from external violence, all its provisions were bent towards that end. No merit or distinction, therefore, was recognised, but military capacity—a qualification which required for its creation and development a continuance of the feuds and disorders which it was its ostensible design to quell, but which long continued to cover the face of Europe with desolation. War was thus the prevalent occupation; and not only were the regulations necessary to maintain internal order and peace deficient, but the want of such laws was not felt, for the arts of peace were unknown or despised, every profession but that of arms (with the single exception of the priesthood) being deemed unworthy of a freeman. It would be vain, therefore, to look for art or science where there was no protection for them; but the policy sketched by Tacitus was literally fulfilled in the desertion of the towns, and the devastation of the country. In such circumstances,

a universal mental prostration, a state of rudeness and ignorance, was unavoidable, and religion itself, not being founded upon knowledge, degenerated into superstition. Again, as protection was the object of the feudal tenure, and the value of the protection was necessarily proportionate to the extent of the overlord's territory, there was a constant inducement, not only to maintain his possessions unabridged, but to enlarge them. The danger of weakness from diminution was avoided by the law of primogeniture, which prevented division; and the risk of alienation was obviated by entails. We do not inquire here into the expediency of these rules, but only note them as the means of preserving estates entire. Extension of domain was attained by aggression, supported by force and military skill. We must also note the effects upon character, which flowed from the undue elevation of the feudal lords upon the one hand, and the excess of subserviency in their subordinates on the other. The glance which we have bestowed upon the feudal incidents exhibits—what the full detail of them would more strikingly display,—practices tending to selfish aggrandizement and indulgence in the superiors, and to physical and moral subjection in their vassals, alike inconsistent with rational liberty. In other respects, too, the feudal habits produced results calculated to engender confusion in the moral perceptions—as, to take a familiar instance, when feudal rank and privileges gave a child precedence of its parent by succession—a result which may be comparatively harmless now, when moral influences are more independent of conventional distinctions, but could not be wholesome in an age of darkness and of moral weakness and depression. M. Guizot, in his lectures on the civilisation of modern Europe, has given a picturesque view of the feudal relations in their actual operation, and a striking representation of the tendency of these relations to engender blind and inconsiderate selfishness on the one hand, and abject servility on the other.

The causes, by which the human mind and society were gradually liberated from the bonds of ignorance and barbarity after the tenth century, have been distinctly traced by Dr. Robertson in the view of the state of Europe prefixed to his *History of Charles V.*; and to his perspicuous pages I must refer for an account of the influence exercised by the Crusades, which carried men to the fountains of learning and knowledge, producing interchange of ideas, and consequently enlargement of views and removal of prejudices. The erection of free towns was another powerful instrument in the establishment of popular freedom. The enfranchisement of slaves, and the extension of political power to the inhabitants of cities, provided a counterpoise to the barons, and enabled the Crown better to resist their domineering spirit. The regular administration of justice was promoted by the abolition of private war, the prohibition of trial by judicial combat, and the allowance of appeal from the barons' courts. To these

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CAUSES OF
GRADUAL
DECLINING OF
FEUDAL SYSTEM.

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causes are to be added the influence of the Canon Law, and the revival of the Roman jurisprudence—the strange but refining spirit of chivalry with its noble sentiments and generous manners—the resuscitation of ancient learning, and its advancement hand in hand with science in schools and colleges—and, lastly, the progress of commerce, aided by the other improvements which we have noticed. These causes powerfully counteracted both the inherent severity, and the incidental excesses of the feudal system; and, even when we view it apart from such controlling influences, we are not to forget, that it was a weapon whose strength and edge were adapted to the service it had to perform. Those who are most forward to proclaim its faults are forced to admit at the same time the services which it rendered in opposing a powerful resistance to absolute power in the Crown, and to acknowledge that the worst effects of the feudal habits were not too high a price for the escape from despotism, which we mainly owe to them. The deference to rank which the feudal institutions enjoined has been a direct source of peace and good order in society, and a powerful security for their maintenance; nor can it be doubted, that the same cause was instrumental, in combination with the crusades and chivalry, in imparting to men habits of self-restraint and courtesy. The feudal principle of allegiance has also contributed much to the formation of what is faithful and trustworthy in character, and to these various sources we cannot err in ascribing a large share in elevating the tone of moral feeling in modern times, by imparting and sustaining the principles of truth and honourable sentiment.

We have seen enough to enable us to understand and appreciate the language of the historian, when he characterizes this, as “that prodigious fabric, which for several centuries preserved such a mixture of liberty and oppression, order and anarchy, stability and revolution, as was never experienced in any other age, or any other part of the world.” In the progress of our studies we shall have ample occasion to observe the extent of our obligations to a kind Providence, which has so directed the fortunes of this country, that whatever remains of the sternness of feudal rules is employed to protect legitimate rights, and insure the security of property, and that its offences against natural justice have yielded to the peaceful influences of Christian light, and of legislation founded upon the principles of equity and reason.

AUTHORITY OF
consuetudines
feudorum.

II. *Feudal usages as established in Scotland.*—The feudal usages received in Scotland were not modelled in precise conformity with the Books of the Feus, nor has our practice ever exhibited the principles of that system in their strictness. These books, indeed, were not regarded as strictly authoritative anywhere but in Germany, and

in the countries subject to that empire ; and even there the influence accorded to them did not result from legislative sanction, but from a conventional recognition of their authority. The *consuetudines feudorum*, therefore, will be studied with little practical benefit, unless we keep constantly in view our own laws and customs. The Statutory and Common Law of Scotland is our highest authority in feudal questions. Then the usages of other countries observing the feudal institutions may be appealed to ; and it is only after both of these have failed to afford a solution, that we betake ourselves to the Books of the Feus.

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Of the system thus moulded from our own peculiar usages in combination with the primary feudal principles, it is evidently very important, that we should possess some accurate conception, before proceeding to examine the writings employed in it, and I shall, therefore, enter, in the first place, into a brief statement of the practical results of the feudal system, as these now exist in Scotland, in the rules by which the various interests connected with the possession and transmission of heritable property are determined and secured. If we shall succeed in forming an accurate idea of the system generally, that will serve as a vantage ground, from which as from a height we may constantly afterwards survey for guidance and explanation the various portions of the field which is to be explored.

The fundamental principle of the feudal system then is, that, with trifling exceptions, all right to property in land flows from the Sovereign, as originally the owner, and ever afterwards holding the paramount feudal supremacy. We say with trifling exceptions, for the allodial tenure, by which lands are held free from the continued liability of acknowledgment to any dominant proprietor, occupies only a small space in our Jurisprudence. This, as we have seen, was the tenure of all property among the Romans, with whom a purchaser of land acquired it entirely free from any interest either real or fictitious reserved to the seller, the latter being denuded as absolutely, as if the subject of sale had been a piece of money or a corporeal moveable transferred from hand to hand. Even after the introduction of the feudal system allodial possessions might be created by the act of the overlord, divesting himself not only of the rights of property, but of those rights also which were the grand characteristics of the feudal system, viz., the claim to the vassal's acknowledgment and services. Such were the grants by Pepin, Charlemagne, and Lotharius to the Roman Pontiffs of the city of Rome and of other cities conquered from the Lombard kings ; for, in these gifts, the granters reserved no claim of service or acknowledgment to themselves. The claim of homage, where it was reserved, was the frequent cause among proud feudatories and overgrown principalities, as well as between powerful kingdoms, of the struggles to throw off subjection, or to transfer its

FUNDAMENTAL
PRINCIPLE,
THAT ALL LAND-
RIGHTS FLOW
ORIGINALLY
FROM THE SOVE-
REIGN.

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claims, which fill many pages of history, and impart an interest to the records of chivalry and the creations of romance. With regard to these struggles, it is well known to every student of our own annals, that this country may well say,

— “ Quæque ipse miserrima vidi,
Et quorum pars magna fui.”

EXAMPLES OF
ALLODIAL PRO-
PERTY IN SCOT-
LAND :—
1. CROWN PRO-
PERTY.

Bell's Prin.
§ 670.

M. 11,685, and
11,686.

2. CHURCH PRO-
PERTY.

3. UDAL PRO-
PERTY.

Bankt. 543.

But, as a nation, we congratulate ourselves, that it was only under the temporary pressure of superior force, that any word or act of vassalage was ever extorted, and that the spirit of the people was too earnest, and their patriotism too indomitable, ever permanently to submit to a foreign yoke—a historical fact, of which the chief value consists in the moral qualities which it indicates. To this cause we must ascribe the circumstance, that almost the only example of allodial property in Scotland is the patrimonial property of the King, which is allodial, because it is held of no superior. That property consists, in the first place, of rights reserved to the Crown out of lands feued to the subject. Such are the right to mines of gold, and also of silver, when found in a certain amount—the right of forests, which are so strictly royal, as not to be transferred by a grant of the lands within which they lie, unless expressly conveyed—and the right of fishing for salmon. Besides these, there are the patrimonial estate of the Sovereign, consisting of lands, castles, strongholds, and palaces—and the principality of Scotland, belonging to the Sovereign's eldest son as Prince and Steward of Scotland, and to the King *jure coronæ*, when there is no Prince. Decisions shewing the nature of the King's interest in the principality when there is a Prince, and when there is not, will be found in the Dictionary. As a part of the Sovereign's allodial estate, there is also to be classed the superiority of the lands belonging to subjects in property, which estate of superiority is reserved to the Sovereign as the fountain of all feudal rights, and contains, as we shall afterwards see, a certain substantial pecuniary value. The second class of property excepted from the operation of feudal rules, and, therefore, classed under the category of allodial subjects, consists of the property of the Church in its churches, churchyards, manses, and glebes, to which a perfect title is created by the designation of the Presbytery, without any grant from the Crown, and without requiring the Crown's sanction or confirmation. The last exception is that of the properties in Orkney and Shetland held by the *udal* tenure. Upon the marriage of the daughter of Christian I., King of Denmark and Norway, to James III. of Scotland, these islands were mortgaged in security of her portion, and the right of redemption having afterwards been renounced, they became the absolute property of the Scottish Crown. But it was a condition of the transfer, that the owners of the soil should continue to hold their

property by the same title as before. That title, however, consisted merely of natural possession, which might be proved by witnesses, and no written evidence was required. The same simple tenure still subsists with regard to those lands within the islands, of which the proprietors have not feudalized them by obtaining a charter from the Crown. They are liable to an annual impost called *skat*, payable to the Crown; but, while the original tenure remains unconnected with the Crown by a feudal relation, the udal lands are allodial, and not subject to feudal rules. This was held in *Dundas v. Heritors of Orkney and Shetland*, 24th January 1777. Lord HAILES, as the report of this case shews, derives the term *udal* from the same roots in the Norwegian tongue from which *allodial* is supposed to come, and he ascribes to it the sense of "*totum vel absolutum imperium*." When, however, the feudal relation has once been constituted by charter from the Crown and sasine following, the lands in these islands, thus feudalized, are governed by the ordinary feudal principles, with the exception of Church lands not exceeding £20 Scots of valued rent, which, by 1690, cap. 32, are appointed to be held by the udal right, without requiring to renew their rights and infeftments. Recent decisions of the Court regarding udal lands are strikingly illustrative of the fundamental principle of the feudal system, that under it all heritable property is held ultimately of the Sovereign as paramount superior. In *Beaton v. Gaudie*, 2d February 1832, lands in Orkney, held for a long time upon a written title by dispositions and sasines, were found not to have been feudalized, because the sasines did not proceed either upon charters from the Crown, or from a subject who derived his right from the Crown. The same rule was applied in *Rendall v. Robertson's Representatives*, 15th December 1836, where the title did profess to be granted by a disponent of the Crown, but that disponent's right had been rescinded by statute, and thus the lands, not being traceable by a valid title up to the Crown, were held not to have been feudalized. Reference may also be made to *Spence v. Earl of Zetland*, 25th January 1839, where there was discussion upon this point, and a udal proprietor was found entitled, as well as if his title had been feudal, to sue for the division of a commonalty.

With the exceptions which we have now pointed out, the Sovereign is really and practically, not only in a sense proper to conveyancing, but by a reserved substantial interest, the original proprietor of all heritable subjects. After the conquest of Jerusalem by Godfrey of Boulogne and his comrades in the crusades, that kingdom was divided among the victors in portions, to be holden for knight's service, (i. e., that the grantee of each portion was liable to furnish a specified number of men-at-arms when required,) which is the original feudal tenure, and so natural to the origin and purpose of the system, that it was presumed to be the tenure when the grant was silent. We have

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UDAL LANDS
MAY BE FEU-
DALIZED.

5 Br. Supp. 609.

10 S. 286.

15 S. 265.

1 D. 415.

SOVEREIGN ORI-
GINAL PROPRIETOR,
AND PARAMOUNT OVER-
LORD.*Infra*, p. 501.

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SOVEREIGN
ORIGINAL PRO-
PRIETOR, AND
LORD PARA-
MOUNT.

ROSS, II. 56.

Leges Malcomi.

another example of the assumption of the whole lands of a kingdom, and the issue of them in grants to the Crown vassals, by William of Normandy after the Conquest; for, although there may be found faint traces of feudal customs among the Anglo-Saxons, it is to him that the systematic introduction of the feudal policy in England is to be ascribed. In Scotland, those of our antiquarians who maintain with jealousy the genuineness of our most ancient national records believe, that we possess in the "*leges Malcomi*" evidence of the establishment of the feudal system in this kingdom by one Royal Act; for the introduction of that relic bears, that "King Malcolm gave and distributed all his lands of the realme of Scotland among his men, "and retained nothing in property to himself, but the Royal dignity, "and the Mute hill in the town of Scoon;" and that "all the barons "gave and granted to him the ward and relief of the heir of ilk baron "when he should happen to decease, for the King's sustentation." And, although our best authorities (contrary to Skene, who recites it without suspicion, v. "*Relevium*") reject that document as not authentic, yet the transaction which it professes to record is undoubtedly a representation of what, either by one act or by a series of acts conferring new grants, or confirming previous possessions, gave to our land-rights their systematic character as all primarily derived from the Crown, the common fountain of feudal property and object of feudal homage.

SUBINFEUDA-
TION.STATUTE *quia*
*emptores.*ORDER OF
SCOTCH VAS-
SALS.Skene *de verb.*
sign.

By the first statute made in the 18th year of Edward I. (1290), called from its initiatory words the act "*Quia emptores terrarum*," it is shewn, that before that enactment subinfeudation was practised in England, sales of land being made in such wise that the purchaser held "*de feoffatoribus suis*," (i.e., of the seller, who gave him warrant of infeftment,) and not *de capitalibus dominis feodorum* (i.e., of the over-lord, of whom the seller held.) The purpose of the statute was to prohibit this practice, and the object was effected by allowing such sales only, in which the purchaser should hold of the chief lord by the same services as his feoffer held before. This statute, accordingly, rendered it impossible to create subordinate feus of a rank inferior to those held immediately of the chief vassals of the Crown. But no such impediment to subinfeudation has ever been interposed in Scotland. On the contrary, a descending array of subordinate feudatories was an inherent characteristic of the system. The vassals first in dignity were dukes, marquises, and counts, who were termed *capitanei regni*. The second place was given to barons, who were the *valvasores majores*. Then came those who held of the barons, and were styled *valvasores minores*, or *milites*. These also had subordinate vassals called *vassalli* or *subvassores*. The gradation downwards is indicated by the etymology of the word vassal, *quasi bassallus*—i.e., *inferior socius*—from the French "*bas*," low, though it

is derived with greater probability from the German "*ghesel*," a companion, which does not exclude the idea of descent in rank, and corresponds with the similar relation of the king to his counts, the *comites*, or companions who formed his council. Although these feudal relations have long disappeared, the distinctions which they impressed upon our land-rights remain; and it is one of the chief characteristics of these, that they are capable of, and in practice exhibit, a system of vassalage progressively subordinate, the number of inferior feus being without any defined limit.

In feudal language a grant of land is called *feodum*—a fief, or feud, or fee, or, according to our ordinary phrase, a feu. The word *feodum* has been derived from *fides*, as expressive of the fidelity due by the vassal to his lord. But others think, that the term finds its native original more probably and justly in the Norse "*fee*," a reward, and "*odh*," property—i.e., property held as the reward of, or as conditional upon, service, in contradistinction to allodial property, of which the title is absolute and free of any condition. The term is familiarly applied to the land, or subject of the grant; but, in its strict and proper sense, it expresses the right resulting to the vassal from the feudal contract. Our Institutional Writers, following Sir Thomas Craig, whose genius strongly inclined to an enthusiastic cultivation of the feudal system, have defined a feu as "a gratuitous right to lands, given on condition of fidelity and military service, the radical right remaining with the granter." That is a description, however, more suitable to the lips of OBERTUS, the compiler of the Books of the Feus, than to be enounced by those who teach the actually existing nature of our feudal rights. A feu might properly be termed a gratuitous right, at a period when it was in reality what its primary name indicated, viz, a *beneficium*, or, as Craig has it, "*benevola et libera concessio*,"—a free grant held by the precarious tenure of the superior's pleasure. Originally, no doubt, this was a right not to be purchased with money, but the feus of the inferior orders of vassalage soon became the subject of commerce, and far from being a gratuitous right, it is in all modern acceptation and practice onerous in the highest degree, inferred by the payment of a price in one present sum or in annual sums under the name of feu-duty. The conditions of fidelity and military service form also a part of the definition proper to the era of feudal habits now long gone by. We have nothing left which corresponds with the feudal notion of fidelity by the vassal to his superior, if we except the duty of loyalty and service owing by all vassals to the sovereign. This peculiarity gives to the Crown feus the character of *Feuda ligia*; and the same duty to the Crown is by understanding reserved in grants by subjects. But, in feus by one subject to another, the duty of fidelity, as regards homage, lives but in the shadow of a form;

MEANING AND
ETYMOLOGY OF
feodum.DEFINITION OF
"FEU."*Feuda ligia.*

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and, as regards service, it is either reduced to the humble shape of the legal obligation of paying regularly the annual sum in money or grain now substituted for military service, or it has no existence at all, where the pecuniary acknowledgment, as is frequently the case, is altogether elusory. The service of watching and warding, peculiar to the burgage tenure, and which still subsists in its effects, is a remnant of the feudal duties. The last part of the definition, however, viz., that the radical right remains with the granter, is still an inherent principle in our system of land-rights; for the granter of a feu, by the same act which divests him of the possession and profitable use of the subject, adopts the character of superior, which adheres to him by a necessity resulting from the mere fact of his having been invested. This character of superior has a real feudal existence, and cannot with impunity be overlooked or disregarded, whether the interest which it confers be substantial or elusory.

Dominium directum, and Dominium utile.

The relation established by the creation of a feu is thus that of superior in the granter towards his vassal, the grantee; and, as the superior retains the estate to certain effects, it was necessary to distinguish his interest from that of the vassal. The estate of the superior, therefore, is termed "*dominium directum*," while that of the vassal is called "*dominium utile*." The propriety of these names has been the subject of much dispute among Jurists, and the substance of the arguments is given by Craig in the 9th *diegesis* of his first book. The opinion that *dominium utile* is an improper description of the vassal's estate was founded on the assumption, that his right was that of usufruct only, the property remaining with the superior. But this was inconsistent with the ordinary nature of usufruct as a personal right; and it was necessary, therefore, to give that right a peculiar character in this case, as being transmissible to heirs. The view which Craig approves is, that the epithets *directum* and *utile* are taken from the division of actions, the *utilis actio* being that which, for general convenience, is allowed to one who acquires an interest by contract, in order to make that interest practically available or profitable to him, although the highest legal title (i.e., the *dominium directum*) remains with the other contracting party. He, therefore, adopts the distinction of *dominium directum* as descriptive of the superior's estate, and *dominium utile*, as expressing that of the vassal; and in this he has been followed by our Institutional Writers, and by universal practice. The term "*fee*" is applied indiscriminately to both estates, and with evident propriety in the case of all vassals and superiors except the Crown, which being supreme cannot hold a conditional estate.

KINDS OF HOLDING.

Such being the general nature of the relation created by the constitution of a feu, we are next to consider the conditions upon which

the grant was made, *i.e.*, what benefits and services the superior and vassal were reciprocally obliged to render, and entitled to exact. The nature of the services is determined by the tenure or holding. By "*holding*" is meant the relation of the vassal to the superior as regards the conditions attached to the feu. There were originally five kinds of holding in our system:—

(1.) The first was *Wardholding*, so called from the valuable privilege, resulting from it to the superior, of the warding, *i.e.*, guardianship, of his vassal's person and estate during his minority. This was a tenure flowing directly from the original nature of the feu, as a provision to render the superior's property, even when feued out, subservient to his feudal state and power. It was the proper feudal tenure—the same as the military holding by knight's service, which was so inherent in the nature of the feu, that it was the presumed holding, when no other was specified, and, even when another was expressed, this was also held to be implied, if not expressly excluded. The obligation upon the vassal in this tenure, which, from the first word of the clause setting forth the vassal's duties, is called the *reddendo*, consisted simply of "services," or of "services used and wont,"—an obligation, that is, to perform the service implied in the holding, when required by the superior. The power conferred by this tenure being esteemed one of the chief instruments of the rebellion in 1745, wardholding was abolished by the 50th statute of the 20th George II. 1. WARDHOLD-
ING.

(2.) Another species of holding was *Mortification*, which had place, when grants were made to religious houses, or for pious uses. Such grants were *ad manum mortuam*, *i.e.*, to a hand that could neither fight for the superior, nor transfer the grant. Here the *reddendo* was generally "*preces et lacrymæ*." At the Reformation such purposes were declared superstitious, and the mortified lands annexed to the Crown. That forfeiture, however, did not extend to purposes of benevolence not superstitious; and lands may still be mortified for any lawful purpose, to be holden by either of the tenures which still subsist. 2. MORTIFICA-
TION.

(3.) *Feu-holding* is that which was reckoned ignoble in the early era of the feudal system, because not connected with military service, but introduced for the encouragement of agriculture, which the feudal policy of the barbarous ages discountenanced. The tenure of feu-farm is mentioned in the Act 1457, cap. 71, and setting by feu-farm is there encouraged by an engagement on the King's part to restrict his claim to the feu-farm dues, when the lands should have fallen into his hands by the casualty of ward. Here the vassal's obligation is to pay to the superior what is now termed *feu-duty*, but was originally a rent in money or grain—or, it may be, to perform farm services, as ploughing, reaping, &c. This is now one of the holdings most familiar in use, and it is closely analogous to the Roman *emphyteusis*, by 3. FEU-FARM.

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which originally the uncultivated lands of a province, and afterwards other lands, were granted in perpetuity for payment of an annual rent. He who granted the right had the *dominium directum*, and was called *dominus emphyteuseos*, corresponding to our superior, while the other party had the *dominium utile*, and was styled *emphyteuta*, answering in most respects to our vassal. The main point of resemblance in addition to these relations is the acknowledgment of the superior's right by an annual payment.

4. BLENCH-FARM.

(4.) *Blench-holding* corresponds to the *feudum francum* of the Lombards; and the grant by frank-tenement is mentioned, in such terms as shew it to have been practised in Scotland, in the Act 1455, cap. 41. This was the tenure proper to a grant bestowed *ob præclara in rempublicam merita et partam bello gloriam*, and which, on that account, was exempt from all services. So our blench-holding is *in liberâ albâ firmâ*,* and the payment is one penny money, or other amount altogether or nearly elusory. If the duty stipulated be of yearly growth, it is not under this holding exigible, if not demanded within the year; and, whatever is the nature of the blench duty, if the payment be qualified by the words, "*si petatur tantum*," the vassal is discharged by the mere failure to make a demand within the year.

The two last-mentioned, viz, feu and blench holdings are the only proper feudal tenures now subsisting. But there is a

5. BURGAGE TENURE.

(5.) Species of holding proper to royal burghs. The *feudum burgale* is holden by the community of the King; and the tenure is reckoned military, the duties consisting of watching and warding, which at a former period, no doubt, implied the requirement and responsibility of military service. Each proprietor *more burgi* holds directly of the Crown, the magistrates interposing only as commissioners for the Sovereign in renewing investitures. We shall see afterwards that the burgage tenure differs from the feudal in not permitting subinfeudation.

SUPERIOR'S ESTATE.

Such being the different kinds of holding, we have next to learn what are the substantial available rights which the feudal contract bestows upon the parties to it; and

1. PERSONAL SERVICES DUE TO SUPERIOR.

1. *Of what does the superior's estate consist?*—(1.) Originally, as we have seen, the superior's right consisted in the power to require personal services. These, however, in so far as of a military nature, were abolished, as inconsistent with the public security, immediately after the rebellion in 1715; and the value of such services was appointed to be paid in money by the Act 1 Geo. I. Stat. 2, cap. 54, the value being ascertained by the Court of Session, where the parties could not settle it by agreement or arbitration. Such services as are

* "*Firma*" means the duty which the tenant pays to the lord.

not abrogated—those, for instance, of an agricultural nature, ploughing, reaping, carriages, &c., may still be enforced, but they are lost, if not exacted within the year.

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(2.) But the main source of annual return to the superior consists in the yearly payments, substituted for military services, or stipulated by the grant. Although the feu-holding was that to which the service of annual payment was most anciently attached, yet long before the abolition of the military tenure in 1748, as the need of services in the field had diminished, superiors and vassals had by agreement substituted payment in money, which was termed *taxed-ward*. This, in feus held of subjects, is now, of course, converted into feu-holding by the authority already mentioned.

2. YEARLY PAYMENTS IN MONEY TO SUPERIOR.

TAXED WARD.

(3.) A third source of emolument to the superior consists in the casualties of superiority, so called, because arising upon the occurrence of certain contingent events.

3. CASUALTIES OF SUPERIORITY.

In the earlier history of feus the casualties proper to the military tenure were of great value. There was the casualty of *Ward*, which gave to the superior not only the guardianship of his vassal's person while under age, but also the profitable custody of his lands, that he might be served out of the profits of these until his vassal should be of perfect age. There was next the casualty of *Recognition*, which was a forfeiture of the vassal's whole estate to the superior, in the event of his alienating more than half of it without the superior's consent. The etymology of this word as given by Skene is illustrative of feudal principle. The whole estate was primarily in the superior, from whom the vassal's right was derived. The return of the lands to the superior, therefore, is a second ascertaining or fixing of his title to the same lands—hence, *recognition*. The third casualty in ward tenures was *Marriage*—an exaction singularly characteristic of the feudal age and manners. The superior, being dependent to a great extent upon the personal qualities of his vassal, had an interest, that no inimical influence should be intruded in the person of his vassal's wife. He had, therefore, the privilege of choosing and offering a wife to his vassal, who was at liberty to decline the superior's choice, but, by doing so, was subjected to a heavier casualty. Whether the superior interfered or not, he was entitled to a sum equal to the estimated amount of the tocher or portion, which the vassal in ward or unmarried at his ancestor's death might, according to the extent and rental of his property, be expected to receive upon his marriage. That was the *single avail* of marriage, payable to the superior, who might, however, exact the *double avail*, if the ward should refuse to marry a person of equal condition offered to him. These casualties were swept away along with the ward tenure by 20 Geo. II. cap. 50, which, where lands were held ward of the Crown, turned the tenure into blench-holding, and, when they

(a.) CASUALTIES OF WARD-HOLDING.

CASUALTY OF WARD.

CASUALTY OF RECOGNITION.

CASUALTY OF MARRIAGE.

CASUALTIES OF WARD-HOLDING ABOLISHED BY 20 Geo. II. c. 50.

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were held of a subject superior, the ward was converted into a feu-holding at an annual feu-duty to be fixed by the Court of Session. The rules fixed by the Court for estimating the value of the casualties are contained in Act of Sederunt, 8th February 1749, a reference to which is still occasionally requisite in practice.

(b.) CASUALTIES
STILL EXIGIBLE.

IRRITANCY *ob*
non solutum
canonem.

M. 7252.

2 Br. Supp.
238.

M. 15,095.

CASUALTY OF
NON-ENTRY.

Of the casualties still exigible, the first is peculiar to feu-holdings, being a power to the superior to annul the feu, if the vassal shall fail to pay the feu-duty for two years. This irritancy it was always competent to stipulate in the title, and, by 1597, cap. 250, it was made a statutory condition of all feus, that, if the feu-duty remain unpaid for two whole years together, the defaulter shall tyne his feu, in the same way as if there were a clause irritant in the infestment. This statute was enforced in *Ballenden v. Duke of Argyle*, 6th July 1792. This irritancy may be purged by payment at the bar; but, when it is conventional, (i.e., expressed in the title,) purgation is not allowed, unless the vassal give a reasonable excuse for his delay; *Laird of Wedderburn v. Wardlaw*, 13th February 1666. The suit by which this casualty is made effectual is the action of declarator of irritancy or tinsel of the feu *ob non solutum canonem*. If the superior betake himself to this remedy, he cannot claim arrears of feu-duty; *Macvicar v. Cochran & Ker*, 14th July 1748. The other casualties, or occasional payments, due to the superior are common to all the holdings:—

There is the casualty of *Non-entry*, which is founded upon the fundamental right of the superior to have a vassal entered in the feu. The heir of a deceased vassal could not be compelled by the superior to perform services, while he lay out unentered, and, in that case, the superior took the fee in satisfaction of the services. By the early feudal customs, if, after the vassal's death, his heir neglected to enter with the superior for a year and day, his right was *eo ipso* forfeited for ever, the lands reverting to the superior in property *propter negligentiam hæredis jus suum non prosequentis*. The heir is still liable to the same forfeiture, though not so rigidly foreclosed by the lapse of time. Upon the death of the vassal his heir is bound to enter with the superior by obtaining from him a renewal of the investiture in his own person, and he is bound, at the same time, to pay the non-entry dues, consisting of the retoured duties (which are the annual value of the land according to a valuation made during the power of Oliver Cromwell) from the death of his ancestor. In *feu-holdings*, however, the feu-duty is held to be the rent, and, therefore, there is no non-entry duty, until it is judicially claimed along with the superior's other rights at renewing the investiture, because the feu-duty is payable at any rate in terms of the feudal contract. This casualty is incurred not only by the death of a vassal, but by the resignation also of the feu into the hands of the superior, which

act, as it terminates the vassalage of the resigner, renders the purchaser subject to the penalties of non-entry. These are enforced by an action of declarator of non-entry, in which the superior sues to have it found that the lands are in non-entry, and that the bygone non-entry duties since the last vassal's death until the date of citation belong to the pursuer, and that the full rents, maills, and duties of the subject do also belong to him as superior. If the entry is not taken before decree, the superior is entitled to the full rents after the date of citation, unless the vassal can plead a reasonable excuse, as is exemplified in *Robin v. Drummond*, 13th June 1823. Non-entry is not exigible while the fee is full, i.e., while there is in life a party infeft upon a warrant granted by the superior; nor is it demandable, while the subjects are liable to terce or courtesy; nor can it be asked by a superior who refuses to enter the vassal, or by a superior whose own title is not completed, in which case formerly he might be charged to enter and upon failure the vassal was entitled to go to the next over-lord for his entry, which inferred a forfeiture to the immediate superior during the vassal's life by the Act 1474, cap. 57. Additional facilities are provided for enabling vassals to compel an entry by the Lands Transference Act, which we shall afterwards examine. This casualty has no place in burgage holdings, because in these the Crown's vassal is the incorporation or community, which never dies.

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There is also the casualty of *Relief*, (from *relevare*, to lift again,) paid by the vassal's heir as a consideration or price to the superior for granting investiture of the lands, after they have fallen into his hands by the death of the ancestor. The relief originally was a year's rent, but that, in the case of an heir, is restricted to the amount of one year's feu or blench-duty in addition to the duty of the current year. Contrary to the import of a decision founded upon in Mr. Erskine's Principles the casualty of relief is payable by an heir, both in Crown holdings and in feus held of subject superiors, whether stipulated in the investiture or not. The correct doctrine is stated, although not with confidence, in the Institutes.

CASUALTY OF
RELIEF.

ii. 5, 22.
ii. 5, 48.

When a purchaser or other singular successor enters he is liable for a casualty corresponding to the relief, but which, in this case, is called the fine of alienation, or *Composition*. The composition, however, is not limited to the feu or blench-duty, but consists of a year's rent of the subject under deduction of annual and public burdens, repairs, and teind. It is, however, only a year's rent or profit as derived by the vassal that is exigible; and, where a vassal had subfeued his lands at a rate reckoned their fair value at the time, and the subvassals had erected houses which yielded a large amount of rents, it was held, that the over-lord could exact as composition from a purchaser or adjudger of the intermediate estate only a year's sub-feu-

COMPOSITION.

PART III.

CHAPTER I.

F. C.; 2 Bligh's
App. 707.

10 S. 736.

duty, and not the actual rents of the subjects. This was decided in *Cockburn Ross v. Governors of Heriot's Hospital*, 6th June 1815, affirmed 24th July 1820. The report in the Faculty collection is replete with profound legal learning. Following the principle of this decision, it was held in *Campbell v. Westenra*, 28th June 1832, that, when subfeus had been granted for a grassum in addition to the feu-duty of the sub-vassal, the composition payable by the mid-superior's singular successor is a year's feu-duty with a year's legal interest of the grassum. The report of this case shews, that it is still undetermined, whether, in addition to the annual value available to the mid-superior, he is bound to pay such casualties derived from entries to the sub-vassals as may arise in the year of his own entry with the over-lord. The legal rule fixing the amount of the composition is frequently controlled by the agreement of parties stipulating or taxing the composition in the title, commonly by fixing a double of the feu-duty to be payable the first year of the entry of heirs and singular successors.

CASUALTY OF
ESCHEAT.

The casualty of *Escheat* is a forfeiture of the vassal's life-interest in the feu by his remaining a year and day at the horn unrelaxed after denunciation for a crime, or by his receiving sentence upon conviction of a capital offence. The Heritable Jurisdiction Act, 20 Geo. II. cap. 50, § 11, abolished this penalty as well as the single escheat of moveables, where the denunciation was for a civil debt or obligation. But, in denunciation for crimes, if the vassal remain at the horn unrelaxed for a year and day, not only is the condition of allegiance to the Crown, which is implied in every grant, violated, but he is held civilly dead, and the liferent of his lands goes to the superior, excepting in the case of treason and rebellion which carry the fee of his heritage by forfeiture to the Crown. This casualty arises also upon the vassal receiving sentence of death and escaping, as he is disqualified by the judgment from holding the feu, and the escheat subsists during his life. It is to be observed, however, that although the liferent falls by this casualty, the fee still remains in the vassal, and may be disposed of by him in any way which does not prejudice the party entitled to the liferent-escheat. This doctrine was applied in *Macrae v. Macrae*, 22d November 1836, affirmed 27th June 1839.

15 S. 54; M'L.
and Rob. App.
645.DISCLAMATION
AND PURPRE-
STURE.

There were formerly other casualties involving forfeiture of the vassal's estate, viz., *Disclamation*—a penalty for disowning the over-lord as superior of the feu or of any part of it; and *Purpresture*—a term of French origin, implying forfeiture as the punishment for encroaching upon the superior's property. These offences were tried and adjudged by the superior in his own Court, but they have been now long abolished.

VASSAL'S
ESTATE.

(2.) *Of what does the vassal's estate consist?*—The vassal's right,

on the other hand, comprehends the property (under burden of the superior's claims) of the lands in the feu, and of whatever has by annexation become part of them, as houses, walls, trees, &c., with the mines and minerals, and all that is implied in the terms *dominium utile*—the power of all legal profitable use, and of absolute disposal. This right of property is subject to certain exceptions and reservations in favour of the Crown, or for the general good. To the Sovereign are reserved those things which, from excellence in *suo genere*, are accounted *inter regalia*, comprehending, as we have seen, gold and silver mines, salmon fishing, and forestry; also rivers, highways, and ports, which are *res publicæ*, and pertain to the Sovereign. By 1617 cap. 19, to prevent public injury from the multiplication of dovecots, no proprietor is entitled to erect one, unless his lands within two miles produce in rent ten chalders of yearly victual.

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CHAPTER I.

EXCEPTIONS
THEREFROM.

REGALIA.

DOVECOTE.

On the other hand, the vassal acquires right not only to the lands specified in his grant, but to those also which have been possessed for forty years as part and pertinent of the lands conveyed, provided the boundaries of the property be not specified, for, when the limits are defined, nothing beyond them can be acquired by prescription.

PARTS AND
PERTINENTS.

We have thus made a brief survey of the general features of the system of feus as now existing in Scotland. Besides the peculiar burgage tenure there are two holdings proper to the feudal contract, viz., the feu-holding and the blench-holding. The party of whom the feu is held is the superior, and his estate or interest is called *dominium directum*; while he who holds the feu is the vassal, and his estate or interest is called *dominium utile*. The ward tenure involving military service being now abolished, the superior's estate consists of (1.) a right to exact within the year civil services, when stipulated; (2.) the annual payment of feu or blench-duties; and (3.) the casualties of superiority, including non-entry duties when the feu is empty by the death or resignation of the vassal—relief payable by the heir, and composition by a singular successor, as the price of a new investiture upon the death of the last-entered vassal—liferent-escheat, being the entire profitable use of the feu during the life of the vassal in the event of his denunciation for a crime—and the power to forfeit the vassal's right and resume possession upon failure in payment of the feu-duty for two years. And the vassal's estate consists of the entire property, use, and disposal, (subject to the superior's claims) of the lands feued, under burden of certain fixed reservations to the Crown for the Sovereign's behoof, or for the public use or benefit.

RECAPITULA-
TION OF RIGHTS
OF SUPERIOR
AND VASSAL.

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CHAPTER I.

III. *Ancient mode of constituting the feudal relation.*—Before proceeding to exhibit the nature of the instruments by which the feudal relation is now created, it will tend to a more complete apprehension of the force and effect of these instruments, if we first glance at the manner in which fees were constituted by the ancient practice. Although these remote observances are now exploded, it is from them that the present forms sprang as from the seminal originals of which they are the maturely developed fruit. The ancient annals of Scotland have not reached us in such a state of preservation and completeness, as to afford clear evidence of the date at which the feudal system was introduced into this kingdom; but it is supposed to have been about the middle of the 11th century; and from the most ancient documents extant there is no reason to doubt, that at that early period the feudal usages observed here were of the same simple and striking character which distinguished them in other countries whose laws and manners were formed under the combined influence of the Roman and Gothic jurisprudence and usages.

ORIGINALLY
WRITING NOT
REQUIRED IN
CONSTITUTION
OF A FEU.

By our earliest customs, however, the feudal right was established without the intervention of writing. It was created by the act of the superior or lord delivering possession to the vassal with his own hands—of which we have a remnant in the sasine *propriis manibus*.

PROPER INVE-
STITURE.

This mode of conferring the right was called the *proper investiture*. It took place upon the ground in presence of the superior's other vassals, who, from being of the same rank, and all bound to attend the Courts of their superior, and to discharge to him all the duties implied in their tenure, and sworn also to do justice to each other, were termed the *pares curiæ* or *pares curtis*. They possessed judicial powers in cases falling under the superior's jurisdiction, and every vassal under criminal accusation had a right to be judged by them, as the court of his peers or equals. They were witnesses also to the conveyance of the superior's property by the reception of new vassals or the resignation of old. They knew whether the lands had already been granted to another, or whether they remained in the superior's hands and could be disposed of by him. They were witnesses to the new vassal's oath of fidelity, to the conditions of his tenure, and to the fact of sasine or possession being granted to him by the superior. The evidence of the *pares* to these facts was so essential, that grants were null if not made in their presence. The procedure was thus of the simplest description. The superior attended upon the ground, and gave possession to the vassal, receiving his declaration of fidelity, which completed the right without any writing. The conveyance was thus by parole merely, the essence of the transaction being the act of the superior, evidenced by the delivery of possession in the public court of his vassals, in whose memory alone the grant was registered.

Pares curiæ.

In process of time, although the period is not distinctly marked, and would probably be various according to the rank of the parties and importance of the estate, it was deemed advantageous to have a written memorandum of the transaction, and this was simply a brief attestation by the superior that he had delivered possession, the form of this writing giving the name *breve testatum*. This writ is the foundation of the charter, and it was equivalent in its effect to the charter and sasine combined, being evidence under the superior's hand both of the grant and of the delivery of possession; nor was the superior's own attestation indispensable, the certificate of a notary public, or of two witnesses from among the *pares curiæ* being also received, or it was sealed by the superior and *pares*.

The original purpose of the *breve testatum* was, therefore, to certify the fact, that the vassal had been invested, and possession given. But, as it was not always convenient for the superior to attend personally, the practice was introduced of executing the *breve testatum* before possession was given, and directing it to the superior's commissioner or baillie as a warrant to give possession to the vassal. This was called the *improper investiture*, because not conferred upon the ground by the act of the superior himself; and it was another advance towards the charter, the *breve* in this case being antecedent to the possession, of which, accordingly, it could not be received as evidence, unless it bore the seal of the baillie in token of possession having been delivered; or the baillie gave a separate certificate of the fact, corresponding in its effect to our instrument of sasine. An example of the separate declaration by a baillie that he had given possession to the vassal is printed in the appendix to Mr. Erskine's Institutes, No. 3; and, in the charters contained in Anderson's *Diplomata*, there will be found many references to the *breve* as attesting the right to lands. Thus, in a charter by Alexander I. to the prior and congregation of St. Cuthbert's, he grants to them certain lands to be peaceably possessed, "*sicut breve fratris mei Eadgari Regis vobis testatur*."

In the *proper investiture*, therefore, which was the original and natural form, the vassal's sasine—that is, the delivery of possession to him—was antecedent to his written title, which was a certificate of the fact. In the *improper investiture*, on the other hand, the *breve testatum* preceded the sasine, and contained the warrant for conferring it. Fees are now, therefore, constituted by the improper investiture only, because the charter which is the superior's warrant is antecedent to the sasine, which is the attestation of delivery of possession. We shall now proceed to examine these instruments.

PART III.
CHAPTER I.
WRITING INTRODUCED.
Breve testatum.
Skene, voce "*Breve*."
IMPROPER INVESTITURE.

PART III.

CHAPTER II.

CHAPTER II.

CONSTITUTION OF HERITABLE RIGHTS BY CHARTER AND SASINE—RIGHTS
RESULTING THEREFROM TO SUPERIOR AND VASSAL.

I. THE CHARTER.

The charter derives its name from the substance upon which deeds are ordinarily written, although, in practice, charters are written not upon paper, but upon vellum. Charters are either *original*, or *by progress*. The original charter is employed to create a new fee—the charter by progress to renew or confirm a fee, formerly created, to the vassal's heir or assignee. It is the original charter with which we have now to do, and we are to view it in its simple abstract form, as the deed by which a new dependency or feu is created by the transmission of the *dominium utile* from the granter to the grantee. Excepting the peculiar case of the conversion of a udal tenure into a feu, no original charter is now granted by the Crown, because there is no portion of the soil which has not long since been appropriated to its vassals, or as the patrimonial estate of the Sovereign or Prince. The Crown-charters, therefore, which are now granted, are charters by progress, renewing or confirming the ancient Crown grants, and these will be best explained at a future stage, when, after tracing the feudal right from its source, we shall come to inquire into the modes of its transmission. The original charter is thus granted by a subject, either himself holding immediately of the Crown, or else holding of another subject who is a Crown vassal or removed by one or more degrees below the rank of a Crown vassal, there being no limit to the number of subordinate subinfeudations.

Mr. Erskine has been censured for the latitude with which he has applied the term *charter*; but it is to be kept in view, that he is there employing the term in its widest generic sense, as signifying a writing which contains a grant, or transmission, of a feudal right. By modern practice, no doubt, the transmission of a feudal right is called a *disposition*, but we shall afterwards find, that, in the earlier practice, transmissions were made by charters; and, accordingly, the divisions or distinctions of charters given by Mr. Erskine in the passage referred

CHARTERS—
ORIGINAL, OR
BY PROGRESS.ORIGINAL
CHARTER.

Inst. ii. 3, 19.

to are descriptive of the peculiar characteristics of the charter according to its purpose in constituting a fee or in transferring it in one or other of the modes requisite to attain the object of the transference. The original charter is that which Mr. Erskine calls the charter *de me*, because it creates a new holding by the grantee as vassal of the granter as superior.

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CHAPTER II.

This is one of the most important instruments in Conveyancing, and it has been examined and explained by Institutional writers more fully than any other. It will be necessary that we, in like manner, devote some space to it, both on account of its intrinsic importance as the foundation of the feudal right, and for this reason also, that, as the constitution of every new feu is in effect a transmission, and, on the other hand, dispositions by which transmissions are made operate, for the most part, for all practical purposes, as constituting new fees, therefore, whatever tends to elucidate the original charter, explains also, in most points, the form and effect of the disposition. We will, also, in explaining the deeds affecting land-rights, do so with a direct reference to the forms and clauses which were in use before the recent Statutes, and particularly before the 10 & 11 Vict. cap. 48; and that for three reasons, viz. :—

First,—The statute introducing the abbreviated clauses is permissive, and not obligatory, and, therefore, the previous forms may still competently be used, and in special circumstances it will occasionally be necessary still to employ them.

Secondly,—The security of land-rights will, for many years to come, depend upon the accuracy of deeds executed before the date of the Statute, and the Conveyancer must understand their forms in order to qualify him to test the validity of such deeds.

Thirdly,—The abbreviations permitted by the statute are designed only to avoid the prolixity of the old clauses. They are not intended to supersede their effect. On the contrary, the intention of the abbreviations, as declared by the statute, is to produce the same effect as if the previous forms were used. In the progress of our examination, however, we shall notice where the new forms are to be introduced, and their statutory effect.

All charters were at first written in Latin, the language of the once universal empire, and which, after its fall, formed the storehouse of legal learning. In England, Latin was supplanted by French at the Norman Conquest, but it was again introduced by Edward III., and continued until Cromwell, when the vernacular was substituted; but Latin resumed its place at the Restoration, until the reign of George II., when law proceedings were ordered by statute to be in English, a subsequent statute being found necessary, however, to permit the retention in Latin of untranslatable technicalities, such as the names of writs, &c. In France, the introduction of the native language in legal

ORIGINAL CHARTER, COMP.^d.

CHARTERS
FORMERLY IN
LATIN.

6 Geo. II. c. 14.

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proceedings gave occasion to Voltaire's sneer, that the people were thus enabled to read their ruin in their own tongue. In this country, Latin continued to be the language of the Law-courts and of deeds until it was abolished by Cromwell; but it was restored in charters and sasines by Act of Sederunt, 6th June 1661, and continued to be used in Chancery for Crown grants until 1847, when English was substituted by 10 & 11 Vict. cap. 51, § 25. Since the end of the 17th century, charters granted by subjects have ceased to be in Latin.

An original charter may either constitute a feu-holding for payment of an annual duty in money, grain, or civil services, (the last being rare in practice,) or it may create a blench-holding for the annual payment of an elusory duty. We shall first examine the feu-charter, as exemplified in the Juridical Styles, and afterwards point out the variation in the form when the holding is blench.

Vol. i. p. 16,
4th Edition.

The Feu-Charter contains the following clauses, viz. :—

CLAUSES OF
FEU-CHARTER.

1. The narrative clause, including the parties' names and the cause of granting.
2. The dispositive clause, containing (1.) the granter's act of conveyance, (2.) the destination, or substitution of heirs to the grantee, and (3.) the description of the grant.
3. The *tenendas*, shewing the tenure.
4. The *reddendo*, which contains the duties.
5. The clause of warrandice.
6. The assignation of the title-deeds and rents.
7. The granter's obligation to free the subjects of public burdens.
8. The clause of registration.
9. The precept of sasine.
10. The testing clause.

The two first clauses, the narrative and dispositive, by their grammatical construction form one sentence, but the matters which they respectively contain are separable, and it is convenient to examine them separately.

1. THE ADDRESS.

1. *The Narrative*.—(1.) The deed, according to this style, opens with the address, "*Know all men by these presents.*" These words declare the character of the deed, as falling under the class of *notitiæ*. It is not a secret or private contract, but a public instrument coming in place of the act formerly performed in the open Court of the *pares curiæ*, and which, in its effect, will still be patent to the public through the records, where the vassal's right must appear, in order that it may be real and complete. The address, however, is not indispensable, and is now in practice frequently omitted.

2. GRANTEE'S NAME.

(2.) The name of the granter is followed by his designation, or, as

PART III.

CHAPTER II.

CONSENSERS
TO THE DEED.

it is called in England, addition. If the title of the granter (i.e. his right to the lands) be subject to any ambiguity or burden, the grantee will require, that the deed be executed, in token of their consent, by those who have an interest through the ambiguity or burden. It is true, that the signature of one having but a doubtful or a supposed interest adds to the transmitting efficacy of the deed, only in so far as such interest may prove to have a real foundation; but, though the subscription of one who has no right adds nothing to the grantee's right, it does not diminish its validity, and the consenter is precluded from challenge. A familiar example of deeds signed by those who have no real right is a conveyance by trustees, some of whom, having been assumed, may not be vested in the property. Their subscription does no harm; the point to be looked to is, that the deed is executed by all the trustees, or a sufficient number of those who are vested. The question is discussed by Mr. Erskine, whether a charter is valid which is subscribed by the true proprietor, but only as a consenter, and not in his proper character of granter. Sir Thomas Craig distinguishes between the case where the granter has no shadow of right, and where he has a probable right, and holds, that there must be some interest in the principal granter, otherwise the subscription of the true owner will have no effect; but Mr. Erskine thinks there is no real difference, and that, as transmission is founded upon consent, the consent, in whatever way given, either transmits, or founds an obligation upon which transmission by voluntary or judicial act may be obtained, and that this will hold even although the granter has no shadow of a title. Where the granter's title was restricted to a liferent, it is said to have been decided, that his disposition, consented to by his son, who was fiar, was as binding against the son, as if he had been principal disponer; *Moncrieff*; and Mr. Erskine's view of the extreme case where the disponer has no title is supported by the case of *Buchan v. Cockburn*, 11th December 1739, the report of which bears, that the Court was unanimous, that the consent of the proprietor to a disposition *a non domino* implies a conveyance of the property, as what can have no other intention or meaning. The case of *Mounsey v. Maxwell*, 29th November 1808, is an express authority to the same effect; but Baron Hume remarks, that this point did not receive much consideration, and his own observations are worthy of serious attention. He points out, that, although the consenter may be barred from challenge, the question might assume a different aspect, if maintained with a *bonâ fide* disponee of the true owner, who could argue with great effect, that the mere consent did not involve such an act of dominion as could transmit the property. This view coincides with that contained in Stewart's Answers to Dirleton's Doubts. The prudent Conveyancer will, of course, study to avoid any occasion for such a controversy. It is frequently

Inst. ii. 3, 21.
WHAT, IF A
CHARTER IS
EXECUTED BY
ONE NOT THE
TRUE PROPRIETOR,
BUT TO
WHICH THE
LATTER CONSENTS?

Harcarse, 171.

M. 6528;
1 Ross L. C.
33.

Hume, 237.

p. 52.

PART III.
CHAPTER II.
CONSENT OF
CREDITORS, AND
OF WIFE.
M. 14,479.

convenient to obtain in the charter or other conveyance the consent of a creditor, as of a wife infest for a locality or jointure, or of the creditor in a debt heritably secured. The consent of parties so situated can only be granted in a writing subscribed by them; *Landales v. Landale*, 12th June 1752. Consent imports on their part only *non repugnantia*, and that they will not, on the ground of their debts, compete with the purchaser. But it does not imply a conveyance of their debts to the purchaser, or a right on his part to use their debts in support of his right. In order to have such a right, he must obtain an express conveyance. These points are illustrated by Clerk Home's report of the case of *Buchan, supra*. Whatever may be the effect of a charter or other conveyance to which the true owner only consents, no prudent Conveyancer will receive that, when it is in his power to obtain a regular conveyance—for which there is this strong reason, in addition to the inconvenience of a title open to any exception, that there is no implied warrandice against a consenter, and, as a consequence of that doctrine, the consenter is not precluded from insisting in rights which arise in his favour after the date of the consent, although such rights injure the grantee; *Stuart v. Hutchison*, 27th January 1681. Here, and in the previous case of *Forbes v. Innes*, 8th January 1668, a married woman, having consented to her husband's disposition of lands, was found entitled to a liferent secured to her out of the same lands, granted by a posterior deed, and upon which she was infest before the disponent, the maxim, "*jus superveniens auctori accrescit successori*," not being applicable, because a consenter is not the author of a disponent's right, but only agrees to it for any claim which may be in the consenter's person at the time.

It is unnecessary to resume here the explanation of the disabilities under which pupils, minors, married women, and others, lie in regard to the disposal of their property. Upon this subject reference may be made to our introductory observations. When charters or other conveyances are granted, as in various instances they may be, by persons whose power of disposal is subject to restraint, care must be taken to insert the names of the legal guardians or others, as principal or consenting granters, in proper form, and stating correctly the precise capacity in which such parties act. Of these cases examples are given in the Juridical Styles. When the lands belong to a married woman, she is the granter, and her husband is a consenter as regards his character of guardian or curator, which gives him the right of administration of his wife's property. In so far as concerns his own proper right and interest, as his right of courtesy, the husband disposes directly. This appears from the words of style, which are ordinarily these:—"I, A., wife of B., with the special advice and consent of my said husband, and I, the said B., for myself, my own right and interest; and we both with joint consent and assent."

i. pp. 20, 99,
et seq., 4th Edⁿ.
CHARTER BY
MARRIED
WOMAN AND
HUSBAND.

M. 6529.

Ersk. Inst. ii.
3, 25.

M. 7762;
1 Ross L. C.
40.

M. 7759.

(3.) The third part of the narrative is the *cause of granting*. If the grant is gratuitous, the cause will be love and favour; if onerous, a price, or feu-duties, or these combined, or whatever else may be the substantial consideration. When the deed is granted for rational causes—that is, such as do not infer an obligation, but are so reasonable, as to deprive the deed of the character of gratuitous, these grounds will be set forth in a distinct statement. Where no cause of granting is stated, certain presumptions arise from the terms of the deed. If it bears that the granter *gives, grants, and disposes*, then it is held to be a donation. If, instead of *give*, the word *sell* is used, it is accounted onerous; and, when even these indications are wanting, as in a grant made by a precept of sasine merely, then, as no cause is either expressed or implied, Stair holds that the right is gratuitous, which is consistent with the original character of the feu as a *beneficium*. When the consideration is a price, then, by 48 Geo. III. cap. 149, § 22, the charter must be written on a stamp bearing the *ad valorem* duty, (which for charters and other conveyances, of which the consideration is an annual payment, is now reduced, and regulated by 16 & 17 Vict. cap. 63);* and the full purchase or consideration money, directly or indirectly paid or secured, or agreed to be paid, must be “truly expressed and set forth in words at length,” under a forfeiture of £50 by the purchaser and seller, who are also to be charged with five times the amount of duty, of which the revenue may be defrauded by the suppression.

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3. CONSIDERA-
TION.

PRESUMPTIONS,
WHEN DEED
SILENT AS TO
CONSIDERATION.

ii. 3, 14.

STAMP-DUTY.

The cause of granting, it is to be remembered, is *inter essentialia*. In *Brown v. Herries*, 20th June 1701, two lines being delete in this part, and no evidence appearing on the face of the deed, that it was done of consent, a disposition was reduced.

CAUSE OF
GRANTING IS
inter essen-
tialia.
M. 11,541.

In the style before us, the consideration is a price instantly paid, and also the feu-duty stipulated in a subsequent clause. Here, as is usual, the granter acknowledges receipt of the price, and this is complete evidence of payment, for, although the Crown claims the power of revoking grants which proceed upon a false narrative, the rule is different in grants by subjects, the statements in which are in the highest degree obligatory upon the granter, because they are made

* The regulations as to the stamp duties upon charters, dispositions, or contracts, containing the first original constitution of feu and ground-annual rights in Scotland, in consideration of an annual sum payable in perpetuity or for any indefinite period, whether fee-farm or other rent, feu-duty, ground-annual, or otherwise, are now contained in 17 & 18 Vict. c. 83. Where any such deed is made partly in consideration of an annual payment, and partly in consideration of a sum of money or stock, as mentioned under “CONVEYANCE” in the schedule to 13 & 14 Vict. c. 97, it is chargeable with *ad valorem* duty in respect of each of these considerations. If made for any further or other valuable consideration, it is chargeable with such further stamp-duty as any separate deed or instrument for such consideration alone would be chargeable with, except progressive duty; 17 & 18 Vict. c. 83, § 16. Provision is made for the stamping of duplicates; *ibid.* § 15.

PART III. by himself. But this rule, of course, will not shelter a grantee, al-
CHAPTER II. though in possession of the charter, when it can be shewn that he
has obtained it without payment, and is retaining it fraudulently.

IMPORTANCE OF
DISPOSITIVE
CLAUSE.

2. *The Dispositive Clause.*—This is the most important clause of the deed. It expresses the finished act and will of the granter, and is the test and measure of the extent and nature of the right which he bestows, and the grantee acquires. In determining the extent of the conveyance, therefore, the dispositive clause prevails over all the others. The grantee's right is determined by what is here expressed, and, if the dispositive clause is clear and unambiguous, expressions apparently inconsistent in other clauses must give way to it. Of this general rule we shall presently have various illustrations.

1. THE WORDS
OF ALIENATION.

(1.) We have first the words of alienation, "*Have sold, alienated, and in feu-farm disposed, as I by these presents sell, alienate, and in feu-farm dispose from me, my heirs and successors.*" The words in the preterite tense, "*have sold,*" &c., are expressive of the antecedent act of the granter, or the determination of his will, of which, as the true foundation of the grant, the charter is the external evidence. The form has also a very palpable source in the history of conveyancing. Mr. Ross justly quotes with approval the observation of Sir Henry Spelman, that the words in the past tense "do imply some precedent conveyance, as viz., a feofment or livery of seisin, to have been made of the land; and that now the matter having been put in writing, the donor by that writing doth further ratify and confirm the former alienation and livery; for deeds in times past were but notes and subsequent remembrances of the livery precedent." This, as Mr. Ross says, is the key to the nature of conveyances, the common idea, that the substance of the transmission consists in the execution of the deed, being inconsistent with the original nature of conveyances, and an obstruction to an accurate perception of the true import of their terms. These opinions are justified by what we have seen of the ancient forms of investiture in Scotland. The *breve testatum* necessarily used the past tense, because in its first design and nature it was a certificate made after the investiture, attesting that the superior had given and granted the feu to the vassal. And the form retained its place when the *breve* afterwards changed its time and purpose, and, instead of a certificate of past delivery, became an expression of the superior's act conferring the grant, and his warrant for delivery by his commissioner. Independently of their historical origin, the words of conveyance in the past tense, may be considered to have a propriety as bearing reference to the antecedent obligation by minute of sale or otherwise, of which the deed forms the fulfilment and completion.

But the dispositive clause must contain an express act of trans-

mission by the granter. Words declaring his intention, however clearly and unequivocally, are ineffectual—nothing will suffice but an actual transmission by present dispositive terms; *Ogilvie v. Mercer*, 10th December 1793, affirmed on appeal. Here a party claimed under a deed describing him as “first heir appointed to succeed to the granter;” but there was no express conveyance of the lands, and this was held insufficient, because the principles of our law render dispositive words essential. The same principle is illustrated by two decisions in relation to the same deed; *Simpson v. Barclay and Gemmill*, 10th January 1752. The deed was a latter will executed at Buenos Ayres. By a subjoined writing the testator declared it to be his will that his sister and her heirs should enjoy his estate, and requested that the above *disposition* (by which he meant the will) might take effect, as he had no lawyer to advise him better. The Lords found the will not sufficient to convey the lands, but, by the narrowest majority, held it effectual as an obligation upon the heir to denude in favour of the sister. This same settlement was again brought under the notice of the Court in *Montgomery v. Innes and Foulis*, 9th June 1795, when it was strongly censured. Lord BRAXFIELD was “clear that it was ill decided,” and held it to be “an inviolable rule of the feudal law of Scotland, that an estate cannot be carried by a mere expression of will. There must be words *de presenti* conveying the lands.” Another eminent Judge said:—“There cannot be an opinion more hurtful to the feudal law of Scotland, than that a deed, though not in itself a settlement, may be held to be an obligation to dispoise.” These two cases are the two first collected by Mr. Ross in his recent valuable publication of *Leading Cases on Land-rights*.

These decisions, although relating to *mortis causâ* deeds, are precisely in point here, and the principle which they establish applies *a fortiori* to deeds *inter vivos*. It is, therefore, to be held as an invariable rule that, in order to make a deed an effectual conveyance of lands, it must contain words of absolute *de presenti* disposition, and in order to produce that effect the word “dispoise” appears, from the authorities cited by Mr. Ross, to be indispensable.

(2.) The next thing in the dispositive clause is the name and designation of the grantee. These must be clear and unambiguous. They constitute one of the most jealously guarded of the essential parts of the deed, and we formerly had occasion to direct our attention to important decisions reducing deeds on account of vitiation in the grantee’s name not effectually remedied by adoption in the testing clause or otherwise. It is no objection to a deed that the grantee is a trustee merely, and that it does not contain the purposes of the trust, provided these purposes are afterwards legally declared by the granter; *Willock v. Ochterlony*, 14th December 1769. This decision is upon

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DISPOSITIVE
CLAUSE MUST
CONTAIN AN EX-
PRESS ACT OF
PRESENT TRANS-
MISSION.M. 3340;
1 Ross, L.C. 13.Elchies, voce,
“Testament,”
No. 12, and
notes; 1 Ross,
L. C. 1.Bell’s Folio
Cases, p. 203;
1 Ross, L. C. 7.

I. pp. 21, 22.

2. GRANTEE’S
NAME.M. 5539;
1 Ross, L.C. 401.

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Hume, 880.
8. DESTINA-
TION.

the second point of the case, and it was affirmed on appeal. Nor is it indispensable that the grantee be named in the deed. Reference may be made to another deed, to be afterwards executed, for the grantee's name, or the grant may be to a grantee to be named by a person appointed by the granter to nominate him. See Baron Hume's remarks upon *Stewart v. Stewart*, 16th November 1803.

(3.) The next part of the dispositive clause is that which corresponds to the ancient *habendum*, which is still retained in English deeds, and is said by their writers to "limit the certainty of the estate"—that is, to fix its endurance, whether for life, or for a term of years, or permanently, and to what heirs after the grantee. We call it *the destination*. For more than 200 years the destination has been confined to the dispositive clause, although we learn from Craig that in ancient charters it contained no mention of heirs. Our modern practice has had the advantage of diminishing the risk of conflict between two parts of the deed, for it appears from Blackstone, that sometimes the limitation of heirs is inserted in the premises of English deeds, (the premises corresponding to our narrative and dispositive,) and afterwards repeated in the *habendum*, and that, if there was any difference in the terms used in the two places, the premises afforded the rule, that being in English deeds the controlling clause, as the dispositive is in ours.

MEANING OF
TERM "HEIRS."

F. C.

If the grant is made under any limitation or restriction in point of endurance, that appears here, as if the estate is given to one in life-rent and another in fee, or if the succession is not left to be regulated by law, but a certain series of heirs is substituted to the grantee. The ordinary form of destination is to the grantee and his heirs whomsoever—an expression which is to be construed *secundum materiam subjectam*. In moveable rights we have found that the word "heirs" carries the subject to executors, because they are the legal heirs *in mobilibus*. But here the subject is heritable, and, by the same principle, the destination being to heirs whomsoever, the grantee will be succeeded by his heir-at-law, according to the rules of feudal succession, as the proper heir in heritage. The rule with respect to the construction of the term "heirs" was laid down with great precision from the Bench in *Bowie v. Bowie*, 23d February 1809. The result will be the same, if the charter make no mention of heirs, notwithstanding the ancient feudal notion which restricted the vassalage to the personal choice of the superior, and, if the destination should be to a restricted series of heirs—as, for instance, to heirs-male—and they should fail, then the heir-at-law will come in. Should the heir-at-law fail, the Crown succeeds as last heir, and generally makes a gift to the person whom it is probable that the deceased proprietor would have favoured, if he had made a settlement. Thus the superior is for ever divested of the grant, unless it contains a special reserva

tion by a clause of return, or by a clause of pre-emption, which, as we shall afterwards see, entitles him to reacquire it by purchase in preference to other parties.

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As the dispositive is the ruling clause, the rights of parties claiming under the deed are determined by it. Accordingly, where the fee of a property was given to one person by the dispositive clause, and the precept of sasine contained warrant for infefting a different person in the fee, the right of fee was held to be determined by the dispositive, and it was observed that the effect of the discrepancy was, not to vest the fee in the party named in the precept, because there was no act of transmission to him, but to make the true disponee's right still personal, inasmuch as the mistake in the precept prevented his converting it into a real right by infeftment; *Shanks v. Kirk-Session of Ceres*, 27th January 1797. And in another case, where the estate was given by the dispositive clause to the disponee and *heirs-male* of his body, but the procuratory authorized resignation for new infeftment in favour of the disponee, and the *heirs* of his body, the dispositive clause received effect; *Forrester v. Hutchison*, 11th July 1826. It is certainly a great advantage of the forms recently introduced, that, by the avoidance of repetitions, the risk of such errors as these is removed; but we are to be proportionally more careful in securing perfect accuracy in the dispositive clause, for, although it cannot be contradicted, any ambiguity in it may be explained by expressions occurring elsewhere; and, even when omissions in it are manifest, it has hitherto been allowed to supply them by reference to other parts of the deed, as in *Sutherland v. Sinclair*, 26th February 1801, where, two substitutes in the destination being named without their heirs, the clause was nevertheless construed as embracing their heirs, because they were contained in the procuratory of resignation and other clauses.

DISPOSITIVE
THE RULING
CLAUSE.

M. 4295;
1 Ross, L. C.
42.

4 S. 824.

M. voce, "Tail-
zie." Appx.
No. 8; 1 Ross,
L. C. 45.

Besides heirs, the dispositive clause ordinarily extends the grant to assignees. As long as the feudal rules were strictly observed, this was necessary, the superior not being bound to receive a stranger, when he had not consented to alienation of the feu. This rule was practically abolished, however, and power of disposal conferred upon the vassal by the 20th Geo. II. cap. 50, § 12, by which any purchaser from a proprietor duly infeft is entitled to force the superior to receive him.

DESTINATION
TO ASSIGNEES.

The charter bears, that the grant is made "heritably and irredeemably." The latter word is the remnant of periods of civil commotion and distrust, when, in the fluctuations of power, public men inflicted forfeiture and ruin upon each other. In order to shelter themselves from the effects of such calamities, those who apprehended them granted conveyances of their estates in favour of parties, who although *ex facie* absolute disponees, were in reality trustees merely,

"IRREDEEM-
ABLY."

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and acknowledged their fiduciary character by bonds of reversion granted privately, which enabled the granter, when the storm had passed, to reassert his right, and obtain possession of his property. The word "*irredeemably*" means, that the conveyance is absolute and permanent, no right of reversion or redemption remaining with the granter. It distinguishes the conveyance upon a sale from the conveyance upon a mortgage, the latter being in security only, and, therefore, "*redeemably always and under reversion.*"

4. DESCRIPTION
OF SUBJECT.

(4.) The next part of the dispositive clause is the description of the subject. There is no invariable rule as to the manner in which the lands must be described. Only this is indispensable, that means be furnished for ascertaining with certainty the lands or other subjects conveyed. We shall find afterwards that a general conveyance of all the lands belonging to the granter, without any specification of them, is an effectual alienation, and may even operate to confer a feudal title, if it contains a precept of sasine, provided evidence is produced to the notary of the identity of the lands by exhibition of the granter's infestments. It thus appears, that a description by reference, or in any other mode which secures the identification of the subjects, is sufficient; but the cases are rare in which it is necessary to adopt a method exposed to so many inconveniences. The regular course is to describe the subjects, and the description may be either general or particular. In the conveyances of old estates, which have not been subdivided, the description consists simply of the name of the lands, and they are thus effectually conveyed, however vast in extent, and without any specification of boundaries, the ascertainment of these being sufficiently secured by the evidence of the granter's possession. When the lands known by the general name have been erected into a barony, which is the highest species of union of lands and heritable rights, a conveyance by the general name carries subjects which would otherwise require to be specified. Therefore, by his infestment in the barony of Lochow, the Earl of Argyle was held to be vested in the burgh of barony of Inverary, although not mentioned in his title; *Argyle v. Campbell*, 15th January 1668. When the circumstances permit of a description thus general, it is evidently upon every account the most advantageous, since it preserves brevity and simplicity in the titles, and avoids the risk of error incident to minute descriptions, as well as the application of the rule of law, which restricts what is general to the particulars of which it is said to consist. Of this rule there is an illustration, as well as a caution against endangering a general description by specification, in the case of *Murray v. Oliphant's Wife*, 1st February 1634. Here a party was infest in "the whole Mains," containing the lands underwritten, but two of the subdivisions of the lands known by the general name of the Mains were omitted, and his right was

GENERAL DE-
SCRIPTION.

M. 9631.

M. 2262.

held not to extend over the omitted portions. When it may be necessary from any circumstance, therefore, to give the particulars, the enumeration ought to be guarded by such words as leave the conveyance still to depend upon the general description—as, for instance, “*or of whatever other or additional parcels the said lands of A. may consist.*” The description in the previous titles is evidently the best probable test that the grantee acquires that which belongs to his author, and so the general practice is to adopt that description. Where the lands were formerly known by another name, or passed under a different description, or where the grant forms a part only of the grantor’s estate, then it may be advisable, besides the new or limited description, to insert that by which the lands sold, or those of which they form a part, were formerly known. When a part of the lands known by a general description has been sold to another party, a disposition of the remainder under the general description, qualified by the words, “*as possessed by me,*” will generally suffice to limit the grant; but the reference to the grantor’s possession is not necessarily taxative, (*i.e.*, it does not necessarily limit the grant to the remainder;) and so, in *Gardner v. Scotts*, 6th December 1839, 2 D. 185. reversed 3d March 1843, a party having sold 16 acres of his property afterwards granted a disposition, in which the general description was inserted without any mention of the part previously sold. The second disponent made up his title, and possessed in such a manner as to enjoy the profits of a mid-superiority over the 16 acres, which possession was homologated by the prior disponent. It was held by the Court of Appeal that the words, “*as possessed by me,*” were not taxative, defining the precise limits of the lands, but were in the circumstances to be held descriptive or demonstrative, and were not inconsistent with the attainment by the second disponent’s prescriptive possession of a valid right to the mid-superiority. See Lord FULLERTON’s opinion, which was supported and eulogized by the Lord Chancellor and Lord BROUGHAM as a masterly judgment. Trivial discrepancies in the orthography of the name of lands are disregarded, where there is no reasonable doubt of the identity; *Malcolm v. Campbell*, 7th July 1849. 11 D. 1261.

Besides the general description, and the description by detail of the names of lands and other subjects, the grant may be described by its limits, in which case the charter is called by Craig *charta extensa* or *extenta*, and in modern language a *bounding charter*, the subject in this case being *ager limitaneus*. To the effect of this in restricting the rights of the grantee it is very necessary to attend. When the limits of a subject conveyed are not specified, the grantee may acquire certain privileges, and even rights of property, over other lands either adjoining or discontinuous, the enjoyment of which during forty years confers a right which will pass along with the

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GENERAL DESCRIPTION OF
LANDS, CONTD.

BOUNDING
CHARTER.

- PART III.
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- M. 9636. lands under the general name of parts and pertinents, although not specified. Now, the effect of a bounding charter is, that the grantee can acquire by it nothing which lies beyond the boundaries. Of this there are various examples in all the authorities. In *Young v. Carmichael*, 17th November 1671, a piece of waste ground on the west side of a close had been possessed for forty years by a proprietor on the other side, but, as his tenement was described in the titles as lying on the east side of the close, he was held to have no right to prescribe the subject in question, since it lay beyond the bounds of his property. So, in *Kerr v. Dickson*, 28th November 1840, affirmed 18th July 1842, the boundary in the titles being the sea-wall, although *de facto* the property was bounded by the sea, the owner was held excluded from claiming land to be gained from the sea by artificial operations. The effect of the bounding charter is very distinctly shewn by the decision in *Berry v. Holden*, 10th December 1845. Here the Crown vassal's boundary was "*the water of Tay on the north.*" By a subordinate grant he subfeued a portion of the same lands, the boundary of the subfeu being "*the flood mark on the north.*" The question which arose was, whether the subfeuar had acquired right to the ground between high-water mark and the river. It had been settled by decisions referred to in the report, that a party whose boundary is the *sea flood* has no right of property in the shore, and as the subfeuar's boundary was the *flood mark*, the Court found that he had no right to the ground claimed, but that it belonged to the Crown vassal, whose boundary was the river. The case of *Magistrates of St. Monance v. Mackie*, 5th March 1845, is to the same effect, and the study of it will be found useful in the interpretation of such boundaries. Here, in the title of one party, the boundary was "*the common passage and full sea,*" and, in that of another, "*the full sea,*" and sometimes "*the full sea the High Street intervening.*" Both these titles were held to debar the proprietors from acquiring any property beyond the High Street or common passage. So also in *Smith v. The Officers of State*, 13th July 1849, the boundary being the *sea-shore*, the vassal was held by the House of Lords to have no right to enclose ground covered by the sea in ordinary spring tides.
- 8 D. 154.
1 Bell's App. 499.
- 8 D. 205.
- 7 D. 582.
- 6 Bell's App. 487.
- BOUNDING
CHARTER, contd.
- 13 D. 1.
- 2 S. 525.
- The principle restraining the application of the description, where limits are defined by the charter, is shewn in another form, where lands are described as lying within a particular parish, no land lying beyond the boundaries of that parish being claimable as part and pertinent under such a title. Of this there is an example in *Gordon v. Grant*, 12th November 1850, confirming the earlier decision in *Hepburn v. Duke of Gordon*, 25th November 1823. But, although the bounding charter prevents the acquisition of property beyond its bounds by possession as part and pertinent, the rule does not extend

to the acquisition of servitudes, as of pasturage, which may be effectually established by prescriptive possession upon subjects beyond the bounds; *Beaumont v. Lord Glenlyon*, 11th July 1843.

When the grant is described both by boundaries and by measurement, the boundaries determine its extent, although containing a larger quantity of grounds than the measurement; *Ure v. Anderson*, 26th February 1834, referred to as authoritative in House of Lords in the subsequent case of *Gardner, supra*; and the same was held in *Fleming v. Baird*, 12th June 1841. The latter case also affords

an example of the principle, that deeds are to be interpreted not by the letter, but by the necessary intention, of their language; for, in this case, the boundary being the bank of a canal, that was held to mean, not the water line, but the exterior line of the towing path. The case of *Swan's Trustees v. Muirkirk Iron Company*, 1st February 1850, is to the same effect. The effect of a description by measurement depends upon the question, whether the quantity of land formed a condition of the contract. If it did, and if it shall prove that the subject either greatly exceeds, or falls far short of, the measurement, then the transaction will be annulled, as proceeding upon essential error. Of this we had formerly an example in *Hepburn and Somerville v. Campbell*, 4th July 1781, where the advertisement and proven rental of lands sold showed, that by intention and understanding the only sale extended to 2½ acres. The description, however, included 7 acres, and so the sale was annulled. But, when the measurement is not an inherent quality of the contract, it is descriptive or demonstrative merely, and not taxative, and, therefore, in *Hannay v. Creditors of Bargaly*, 26th January 1785, no abatement of the price was allowed for a deficiency of 96 acres out of 1710.

If the description refers to a plan for its boundaries, that will make the deed a bounding charter. When the boundary is a wall, the effect depends upon the words used. If the subjects are conveyed *with* the wall by which they are bounded, the whole wall is the property of the grantee. If they are bounded *by* the wall, then it is excluded from the grant. Where the wall is to belong in equal proportions to the adjoining proprietors, the boundary is the centre of the mutual wall or gable between the properties.

At the end, and as part of the description of the subjects, there are inserted the words, "*parts, pendicles, and pertinents of the same.*" Whatever is accessory to the property passes as pertinent. In the words of Blackstone, by land, which is *nomen generalissimum*, every thing terrestrial will pass; and he cites the maxim—*Cujus est solum, ejus est usque ad cælum*—of which there occurs an illustration in *Downie v. Alexander*, 13th June 1777, where it was held, that the conveyance of an area in liferent gave right to a tenement afterwards

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5 D. 1337; 3

ROSS, L. C. 456.

DESCRIPTION BY MEASUREMENT.

12 S. 494.

2 Bell's App.

129.

3 D. 1015.

12 D. 622.

M. 14,168.

M. 13,334.

DESCRIPTION

BY REFERENCE

TO PLAN.

PARTS AND

PERTINENTS.

M. voce "Im-

plied Assign-

"nation," App.

No. 1; Hailes,

p. 755.

- PART III.** erected upon it. Other cases to the same effect will be found noted in Brown's Synopsis under "IMPLIED ASSIGNATION." *Pertinent* includes not only what is naturally accessory, as buildings and wood, but, as we have already noticed, rights also acquired by possession over other lands, whether contiguous or separate. The mention of parts and pertinents is not a necessary condition of the acquirement of rights of that description. It is correctly observed by the Lord Justice-Clerk HOPE, that "a grant of the lands of A. is as extensive "as a grant of the lands of A. with parts and pertinents." The question in such cases is what lands fall under the designation of A. as known in the country. Of the things which are naturally or directly accessory, it was formerly doubted, whether mills erected on the ground passed as part and pertinent, or formed a separate tenement, and required to be conveyed specially. This doubt was founded upon the feudal usages, by which the mill, with the privilege of astringing the vassals to it and exacting multures, was a source of gain to the superior. In the same way the superior, in the days when the feudal power was strong, kept ovens and wine-presses, exacted duties for baking, and kept a smith, and claimed his profits; and examples are given by Ross of thirlage to the baron's oven, as well as to his mill, and of reservation of the rights of smithies, and of brewing, and ale-selling. There is no doubt that a mill, like any other part of the superior's property, may be formed into a separate tenement by a special conveyance, but, in accordance with Mr. Erskine's opinion, it was decided in *Rose v. Ramsay*, 17th June 1777, that mills, although not specified, are carried by a disposition of lands as parts and pertinents.
- CHAPTER II.**
PARTS AND PERTINENTS, cont'd.
- 13 D. 7. **DO MILLS PASS AS PARTS AND PERTINENTS?**
- ii. 169. **M. 9645 ; Hailes, 756.**
- 16 D. 827. **EXTERNAL ACCESSORIES PASS AS PART AND PERTINENT.**
- M. 9643.**
- Difficulty has been felt, where the effect of a sale has been to introduce an additional party to the use or enjoyment of a common property or privilege of such a nature as not to be capable of limitation in proportion to the extent of the property acquired. So, where two proprietors had been found by the Court to have a joint right and common property in a loch 11 miles long, one of them having disposed a part of his property with lake and pertinents, the question arose, whether the disponent became a participant in the joint right and common property of the loch. The Court decided that he did acquire right to a share of his author's joint interest; *Mensies v. Macdonald*, 10th March 1854; affirmed on appeal.*
- With regard to external accessories, or parts and pertinents claimed in connexion with other lands than those mentioned in the grant, there is no doubt, that immemorial possession of a subject as part and pertinent of lands in the title is sufficient to exclude any one who cannot produce a special right. This principle is the express ground of the decision in *Glendonwyne v. Parton*, 5th July 1716; and the

* Not yet reported.

rule is exhibited in very numerous cases, where a great variety of rights, connected with subjects external to those described in the grant, have been held to be effectually transferred by a conveyance with parts and pertinents. Of these the following are examples, viz., *Borthwick v. Lord Borthwick*, 14th February 1668, where a right was sustained to common pasturage in a muir, which had been possessed by the granter at the date of the sale. In *Lithgow v. Wilkieson*, 15th January 1697, and *Peden v. Magistrates of Paisley*, 21st November 1770, a seat in church, and a burial place, were held to be conveyed as parts and pertinents; and in *Nisbet v. King*, 7th February 1724, a moveable dial upon a fixed standard in a garden. In *Braid v. Douglas*, 24th January 1800, eel cruives in a river were held to have been carried as part and pertinent in the conveyance of land along its bank. The principle applies also to whatever is gained from the sea *alluvione*, and to rocks, and rocky islands, near the shore. See the observations of the Lord President in *Innes v. Downie*, 27th May 1807. Here a sandbank raised by the sea was held to pass as pertinent of the land on the adjacent shore.

With regard to discontinuous subjects it is stated in Erskine, "that separate farms or tenancies, though not formerly reputed to belong to the land conveyed, may be carried, if possessed as pertinent beyond the memory of man." He guards the doctrine by saying, that a discontinuous subject can seldom be possessed as part and pertinent, and that a claimant who is infeft in contiguous lands will be preferred on more slender proof of possession. But there is no doubt of the general principle, that lands lying disjoined from the lands conveyed will pass as part and pertinent, if enjoyed by prescriptive possession, and not claimed by another party under a special title. Of this there is an example in *Forsyth v. Durie*, 1st March 1632; and in *Bruce v. Dalrymple*, 23d December 1709, an orchard lying discontinuous was held to be conveyed under the general words "houses and yards." Even when lands are included in the title of a party as separate tenements, that does not prevent another from acquiring right to them as part and pertinent of his property by immemorial possession; *Countess of Moray v. Wemyss*, 20th February 1675. In *Magistrates of Perth v. Earl of Wemyss*, 19th November 1829, it was held, that the intervention of a river is no bar to the acquisition of an island by prescription as part and pertinent of a barony, and that the right thus acquired will prevail over a title without possession in another party. A similar judgment was given in *Earl of Fife's Trustees v. Cuming*, 16th January 1830, sustaining the competency of prescribing a right as part and pertinent in an adjoining muir, though expressly included in the titles of another party.

But, in order to prescribe a right of property, when there is a conveyance of parts and pertinents, the possession must be a possession

M. 9632.

M. 9637.

M. 9644.

M. 9628.

M. voce "Pro-
perty," App.
No. 2.

Hume, 552.

Inst. ii. 6, 3.
DISCONTIGUOUS
SUBJECTS MAY
BE CARRIED AS
PART AND PER-
TINENT.

M. 9629.

M. 9638.

M. 9636.

8 Sh. 82.

8 Sh. 326.

POSSESSION AS
PART AND PER-
TINENT MUST BE
POSSESSION AS
OF PROPERTY.

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- 9 S. 336. as of property, and not by way of servitude merely, (that is, the exercising certain rights, not inconsistent with the property being in another,) and possession by way of servitude affords no foundation for prescribing a right of property in competition with another whose possession can only be ascribed to a right of property; *Earl of Fife's Trustees v. Cuming*, 25th January 1831. And, where lands are claimed as part and pertinent, the possession founded upon must have been possession by virtue of the property of the principal subject. Therefore, a glebe of four acres surrounded by a barony having been possessed by the proprietor of the barony for forty years in consequence of an agreement of the presbytery to feu it, which agreement was never completed, he was not allowed to ascribe his possession to the titles of the barony, or to claim the subject as part and pertinent of it; *Scot v. Ramsay*, 15th February 1827.

GREATER *regalia* CANNOT BE
ACQUIRED AS
PART AND
PERTINENT.

- 10 D. 896. It is a general rule, that the greater *regalia* cannot be conveyed, unless specified; and, although it has been doubted whether the *regalia* of lesser importance do not require mention also to make them pass, yet it was held, that a right of ferry, which is one of the *regalia minora*, is effectually acquired by prescriptive possession under a charter of barony with a clause of parts and pertinents; *Duke of Montrose v. Macintyre*, 10th March 1848. Although salmon-fishings, being *inter regalia*, cannot be acquired without mention, a grant *cum piscationibus* not specifying salmon, followed by forty years' possession, was held to form a good right; *Duke of Queensberry v. Viscount Stormont*, August 1773; but for this purpose rod-fishing is not sufficient possession; *Duke of Sutherland v. Ross*, 11th June 1836. The same was held in *Milne v. Smith*, 23d November 1850. In *Ramsay v. Duke of Roxburghe*, 9th February 1848, a proprietor infert *cum piscationibus* was held to have established a right to salmon fishing in the Tweed by proof of forty years' fishing with cairn-nets attached to the banks. The right of trout-fishing was held to be conveyed as part and pertinent, in the case of *Carmichael v. Colquhoun*, 20th November 1787; and, in the later decision of *Mackenzie v. Rose*, 26th May 1830, it was held, that a proprietor of lands adjacent to a river is entitled to fish for trout, so far as his property extends, with rods, but not with net and coble, or in any way prejudicial to the salmon-fishings, and that this is a privilege inherent in his right of property. To the same effect is *Macdonald v. Farquharson*, 14th December 1836. The right of fishing implies a right of access to the banks of the river in the way least oppressive to the adjoining heritors; *Miller v. Blair*, 22d November 1825; upon the principle, that the grant of anything implies whatever is requisite for its use, as the gift of a fountain would be unavailing without liberty of access to enjoy it.

While the clause of parts and pertinents is sufficient to transmit whatever is capable of being acquired under that character, it is an established rule, on the other hand, that whatever does not fall under the description of part and pertinent, as, a right of salmon-fishing, or a subject beyond the limits of lands specially bounded, must be mentioned in the dispositive clause, in order to its being conveyed. It will be unavailing, that anything intended to be conveyed is mentioned in other clauses, for these have not a transmitting power. It is the dispositive clause which ascertains and transmits the subjects to which the grantee is to have right. None, therefore, are transmitted unless they are mentioned in it. Of this rule there is an illustration in the case of *Earl of Aboyne v. Farquharson*, 16th November F. C. 1814, where a party claimed a right of hunting over the property of another on the strength of the words, *cum aucupationibus et venationibus*. These words, however, were not in the dispositive clause of his title, but in the *tenendas*, of which the office is not to transfer the right, but to describe the tenure by which it is held, and the Court being of opinion, that hunting was a right which does not naturally arise as part and pertinent, and too important to be acquired as a servitude, the claim was disallowed, and the decision was affirmed, 22d April 1818.

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WHAT NOT PART
AND PERTINENT
MUST BE EX-
PRESSLY CON-
VEYED IN DISPO-
SITIVE CLAUSE.

In conclusion, it only remains to notice here, that, when a right is conveyed *per expressum*, it is preferable to a claim under a clause of part and pertinent; *Scot v. Lindsay*, 22d July 1635. Here infeftment in a loch *per expressum*—that is, the loch being specially dis-
posed by name in the conveyance—was preferred to a prior infeftment in lands immediately adjoining the loch which contained the words *cum lacu et piscationibus*, but no express conveyance of the loch.

EXPRESS RIGHT
PREFERABLE TO
CLAIM AS PART
AND PERTINENT.
M. 12,771.

At the end of the description, it is usual to name the parish in which the subjects lie; and, if they are in more than one, the name of its own parish and shire is subjoined to each portion of the description.

As the dispositive clause is the measure of the vassal's right, any reservations in favour of the superior—for example, of mines and minerals, or of other rights—ought to be introduced here; and, under the forms of the recent Statute, this is the only clause, in which they can with propriety be introduced; but, to relieve this part of the subject of further detail at present, in order that the general form of the feudal investiture may be more readily apprehended, we shall defer the observations which may be necessary with regard to rights specially reserved to the superior, until we shall have completed the examination of the charter and sasine.

DISPOSITIVE
CLAUSE MUST
CONTAIN THE
RIGHTS RE-
SERVED BY
SUPERIOR.

In leaving the dispositive clause it may be again mentioned, that its importance as the controlling member of the deed cannot be too

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carefully borne in mind. As the effect of an English deed is determined by what is contained in the premises, so, with us, any omission in the dispositive is not supplied by insertion in other clauses, because the granter in these clauses does not transmit, but does something supplementary to the transmission, of which the nature and extent are already determined by the words of the dispositive clause. One effect of the forms introduced by the Lands Transference Act will be in a large measure to preclude the occurrence of such questions in titles originating after its date ; but the rules of law for determining the effect of conflicting expressions in different clauses, or the introduction into one clause of what properly belongs to another, must always be important in determining the rights resulting from titles of a date previous to that Statute.

TERM OF ENTRY. *Term of Entry.*—In the style we are examining, the dispositive clause is followed immediately by the *tenendas* ; but it will now be proper, in accordance with the first section, and schedule A, of the 10 & 11 Vict. cap. 48, to insert at the end of the dispositive a clause declaring the term of entry, which is done in the simple words, “*with entry at the term of*” (Whitsunday or Martinmas, and year, as agreed on.) It is true, that the Act, by its title, refers to the *transference* of lands, and, by its preamble, is applicable to “all dispositions and conveyances, and other deeds and instruments necessary for the transmission of lands and other heritages in Scotland, not held burgage.” But the original charter, although constituting a new dependency, is truly a conveyance of lands ; and it is evidently important with a view to harmonizing the whole system of conveyances, that the requirements of the statute, although not applicable in every respect to this deed, should be complied with, so far as they do apply. The effect of declaring the term of entry will appear, when we examine the clause of assignation of the rents.

ITS ORIGINAL
PURPOSES.

3. *Tenendas.*—This clause takes its name from its first word in the Latin charter. It was originally combined with the *habendum*, and served these three purposes, viz : (1.) To express the grant by its particulars and appurtenances, for which purpose there was inserted with great prolixity a list of accessories, privileges, servitudes, and generally every description of right connected with the estate. This had long disappeared from the charter of a subject-superior, but was retained at full length in Crown charters ; from which also it will now be exploded by the operation of the Act 10 & 11 Vict. cap. 51, passed to amend the practice with regard to Crown charters. (2.) The next original purpose of the *tenendas* was to limit the estate, and this portion of it was called the *habendum*, the object of which, as we have seen, is accomplished by inserting the destination in the dispositive. (3.) The third purpose, and that which it still retains, is to express

the kind of holding. Here, as we have seen, is the chief difference between English and Scotch feudal conveyancing, the holding in England being limited by the Statute *Quia emptores* to a tenure immediately of the chief lords of the feu, while in Scotland there is no restriction in the granting of subordinate or subaltern holdings.

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We have already pointed out the impotency of the clause of *tenendas* to confer any right of property not transmitted by the dispositive clause, of which we had an example in the case of *Earl of Aboyne v. Farquharson*, 16th November 1814. As the rule is very important, and must continue to be so in questions arising out of old titles, which contain a careful enumeration of particulars not expressed in the dispositive, it must be borne in mind, that this enumeration, the terms of which will be found in the Crown charter in the Style-book, adds nothing to the grantee's right, because whatever is part and pertinent of the lands conveyed is carried by the charter, although it be not mentioned, and anything which is not part and pertinent cannot, as we have already seen, be transmitted by the insertion of it in the *tenendas*, the latter clause being merely explanatory of the dispositive. The principle is distinctly shewn by the case of *Keith v. Grahame*, 25th January 1668, where the half of a barony being disposed, with the words *cum moris et maresiis* in the *tenendas*, it was held, that the entire property of a moss belonging to the barony had remained with the disposer, and was carried by his subsequent disposition of the other half of the barony. At the same time, while the *tenendas* cannot transmit a right, it may, in some cases, raise a presumption in favour of the grantee, so as to entitle him to establish a right by evidence of possession; but it is certain, that without such possession no right is conferred. In the case of *Bain v. Lord Duffus*, 12 S. 522. 4th March 1834, a conveyance of lands with "all and sundry mosses, muirs, pasturages," &c., in the dispositive clause was held to confer no right to a common, because no sufficient acts of property were proved. This applies *a fortiori* to the clause of *tenendas*. The meaning of the various antiquated terms contained in the old form of the *tenendas* is explained with much learning by Mr. Ross, and by Mr. Erskine in his title upon the vassal's right by getting the feu.

Tenendas DOES NOT TRANSMIT A RIGHT.
F. C.

I. 524, 3d Ed.

M. 2256.

ii. 166.

This clause is now then limited practically to these two purposes, viz., to point out the superior of whom the lands are to be holden, and to prescribe the particular kind of tenure. In the example before us, it is a feu-holding, and, the purpose of the original charter being to create a new dependency, the superior is necessarily the granter. The clause, therefore, runs:—"To be holden and to hold all and sundry the lands and others above disposed by the said B. and his foresaids of and under me, and my heirs and successors whomsoever, as their im-mediate lawful superiors of the same." This is a holding *de me*—that is, a holding permanently subordinate to the granter and his successors. It is not contemplated, that the grantee shall ever hold

MODERN PURPOSES OF *tenendas*.

FORM OF CLAUSE OF *tenendas*.

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of the grantor's superior, whether the Crown or a subject, and there is no provision made, therefore, for that purpose. The clause proceeds:—"in feu farm," (i. e., for payment of a feu-duty or rent,) "*fee*" (i. e., on the feudal conditions of service here limited to the feu-duty, and casualties,) "*and heritage*" (i. e., with descent to the heir-at-law,) "*for ever, by all the righteous meiths and marches thereof, as the same lie in length and breadth, with houses, biggings,*" &c., (this is the abbreviated remnant of the ancient enumeration of particulars,) "*freely, quietly, well, and in peace, without any revocation or obstacle whatsoever.*" The Transference of Lands Act does not appear to affect the clause of *tenendas* in the original charter. It provides an abbreviated obligation to infeft. But the original charter contains no specific obligation to infeft. In it that obligation is implied by the conveyance, and the second section of the Act, which explains the import of the obligation to infeft, shews, that it refers to cases in which a present or ultimate holding of the grantor's superior is contemplated, and not to the case of the original charter, where the holding is of the grantor only.

4. *Reddendo*.—This clause, which also derives its name from the first word in its Latin form, fixes the particular duty or service to be paid or rendered by the vassal to the superior; for it is a necessary characteristic of a feu, that it stipulates a service, and, even where it is intended that no substantial interest shall remain in the grantor, still the feudal form must be adhered to by the insertion of an elusory duty. In familiar language, the name of the clause is applied to the duty itself.

CIVIL SERVICES.

It is rare now to prescribe actual *services* in the feudal grant, and we have seen, that military services, which were at first the presumed condition of the grant, have been abolished. But reasonable civil services are still lawful, and may be enforced, of which there is an example in *Monro v. Mackenzie*, 20th June 1763, where the service was to drive peats; and in the previous case of *Duke of Argyle v. Creditors of Tarbert*, 5th February 1762, where the vassal was bound at his own expense to keep and uphold a boat of six oars, and to provide the same with six rowers and a steersman, and all things necessary for the use of the superior and his family, and to keep the mansion-house wind and water tight, the Court held, that these were not personal services, and did not fall under the statute, and that the future feu-rights of the estate ought to contain them in the *reddendo*. Although agricultural services are lost if not exacted within the year, this rule does not apply to payments in kind, as kail fowls; *Young v. Bruce*, 7th December 1693; and, if these run into arrear, the superior is entitled either to delivery in kind, or to the market value for the respective years; *Duke of Hamilton v. Mather*, 15th December 1835; affirmed 12th May 1837.

M. 14,497.

M. 14,495.

M. 13,071.

14 S. 162.
2 Sh. & M'L.
App. 586.

In the style before us, the feu-duty is an annual sum of money payable at two terms in the year. PART III.

The vassal is by the feu-contract personally liable to the superior for the feu-duties, and he remains so, even after he has sold the lands, until the new purchaser is entered with the superior; *Wallace v. Ferguson*, 29th June 1739.* No interest is exigible upon feu-duties, unless it be contracted for, until a judicial demand is made, but interest is due from the date of a summons; *Tweeddale v. Aytoun*, 2d March 1842. CHAPTER II
VASSAL PERSONALLY LIABLE FOR FEU-DUTIES.
M. 4195.
4 D. 862.

The *reddendo* provides also for the casualty of relief, and for the composition, "*doubling the said feu-duty the first year of the entry of each heir and singular successor.*" We have already seen, that the heir's liability is the same, whether this stipulation is made or not. As regards singular successors, the effect of the clause is to restrict the superior's right, which would otherwise extend to a year's rent or profit as derived by the vassal. The effect of the words, "*doubling the said feu-duty,*" is to make the heir and singular successor liable in one year's payment besides the payment for the year current at his entry. But, if the terms used are, "*doubling the said feu-duty the first year of the entry, &c., and that over and above the feu-duty for the year wherein the entry is made,*" then the liability is for two years' feu-duty besides that of the year. The same was held in *Earl of Zetland v. Carron Company*, 30th June 1841, where the expression was, *a duplicand of the said feu-duty, over and above the feu-duty of the year.* In this case an inquiry was made into the practice, and a tabular view contained in the report gives seven different forms of the clause, all inferring the payment of three years' feu-duty. TAXATION OF COMPOSITION.
3 D. 1124.

5. *The Clause of Warrandice.*—This is an obligation springing naturally and directly from the purpose of the feudal contract. It was implied in its very nature, that, in return for the vassal's services, the ORIGIN OF WARRANDICE.

* By the feuar granting a separate bond to his superior for the feu-duty, there may be constituted a personal obligation prestatable against the original feuar and his representatives in *perpetuum*—independent entirely of the feudal obligation in the charter—and not to be got rid of by alienating the subjects in respect of which the feu-duty is paid; *King's College of Aberdeen v. Lady James Hay*, 11th August 1854, reversing the judgment of the Court of Session, 11th March 1852. Here the terms of the obligation were, that the vassal "bound and obliged himself, his heirs, executors, and successors, duly and regularly to make payment" to the superior of the feu-duty stipulated in the separate charter. In the case of *Brown's Trustees v. Webster*, 11th March 1852, the party bound himself, his heirs, executors, and successors whomsoever, to content, pay, and deliver to the seller a sum of £375, 8s. in name of ground-rent or feu-duty. The Court of Session pronounced a similar decision to that in the former case, finding that the obligation for the feu-duty followed the subjects, and did not subsist for ever against the original purchaser and his representatives. The House of Lords reversed, and held that the obligation was perpetual, and not to be got rid of by the mere transference of the property; *Elmsley v. Brown, &c.*, 26th March 1855. In both these cases the bonds were granted in implement of articles of roup, which bound the purchaser to grant a separate personal obligation for the feu-duties. Such a personal obligation in perpetuity may even be constituted by insertion of a clause, importing that effect, in the instrument by which the feudal right is originally created; *Small v. Millar*, 3d February 1849, as reversed on appeal, 17th March 1853. 1 Macq. App. 526.
14 D. 675.
14 D. 680.
2 Macq. App. 40.
11 D. 495.
1 Macq. App. 945.

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FORM OF
CLAUSE OF
WARRANTICE.

superior should protect him in his possession of the feu. Their interests were so blended together, that any attack upon the one was necessarily an invasion of the rights or security of the other ; and, as the vassal was bound to present himself equipped for the field at the call of his over-lord, so the superior was equally bound to do battle for the rights of his vassal, when these were invaded ; hence the word, *warrant*, through the medium of the French *guerre*, and English *war*—an etymology entirely agreeable to the ancient terms of the clause, *Contra omnes gentes warrantizabo*. The modern terms of the clause trace their origin with equal significance to the period when trials upon warrantice were determined by single combat. The words are:—“ *Which lands and others above disposed, with this feu-right, and the infestment to follow hereon, I bind and oblige me, and my foresaids, to warrant to the said B., and his foresaids, at all hands, and against all mortals,*” or, as is sometimes seen, “ *against all dead-ly.*” But, if this was a condition inherent in the feudal compact, the vassal’s security did not require its insertion in the charter, since the superior was bound by their very relation to protect him. This provision then was first introduced, according to Blackstone, as a protection to purchasers against the operation of the strict feudal maxim which prohibited alienation of the feu, the security which it afforded being this, that, as he was presumed to have paid a price, the family of the vassal who inherited the price were bound by their ancestor’s obligation of warrantice to repay it, if the heir challenged the sale.

EFFECT OF
WARRANTICE.

Having already treated fully of the subject of warrantice, we shall not enter into any detailed recapitulation here, but shall refer to the explanations formerly given of the nature of warrantice generally—of its effect, when not expressed, but left to be implied from the nature of the transaction—and of its extent according to the different degrees of simple, personal, absolute, and real warrantice. In more immediate connexion with the present subject, it must be remembered, that, in conveyances of land, warrantice is chiefly important with reference to the sufficiency of the title. Absolute warrantice, which is, that in the clause before us, imports that the title given to the grantee is unchallengeable, but not that the lands shall be free from *damnum fatale*. We have seen also, that warrantice does not rear a claim in favour of the grantee, until the subject has been evicted ; and that his claim is not limited to the price and interest, but extends to the value of the subject at the date of eviction. The abbreviated form of this clause, introduced by the Transference of Lands Act, consists simply of these words—“ *I grant warrantice,*” which, by section 3d, are declared, unless specially qualified, to imply absolute warrantice as regards the lands. It is, therefore, carefully to be observed, that, by the force of this Statute, these general words have now a different effect from that which they would formerly have produced. Formerly, a general obligation to warrant implied warrantice

ABBREVIATED
FORM OF
CLAUSE,—EF-
FECT OF.

according to the nature of the transaction. If the conveyance was gratuitous, it bound the granter to do in future nothing inconsistent therewith; if it was for a full onerous consideration, then it implied absolute warrandice. Since the statute, however, makes the general clause in a disposition of lands import absolute warrandice, unless it is qualified, the Conveyancer must be careful, in preparing grants or transmissions for causes gratuitous or not fully onerous, to insert a qualification of the general words of warrandice, otherwise the granter will be liable in absolute warrandice, notwithstanding the nature of the transaction. If it shall be deemed expedient to leave the warrandice to be determined by law when any question shall arise, then the clause must be entirely omitted.

The following observations and cases may be noted, in confirmation or further illustration of the introductory treatment of this subject already referred to:—

The import of personal warrandice being, that the granter has done, and shall do, no act prejudicial to the grantee, the granter, therefore, incurs no liability by eviction which is not imputable to him. In the case of *Craig v. Hopkin*, January 1732, an attempt was made to obtain repetition of the price of an estate evicted from the seller; but the claim was successfully resisted, upon the ground that the seller was bound only in warrandice from fact and deed, and that the eviction had not been through his fault. Although warrandice entitles the grantee to relief of burdens affecting the subject not stated to the grantee, this rule does not extend to petty liabilities which are notorious and inconsiderable; *Gordonston and Nicolson v. Paton*, March 1682. Here the complaint of the purchaser that the lands were subject to a servitude of casting peats was disregarded. As posterior loss from deterioration by fatality affects the purchaser only, so he must bear also whatever after burden is imposed by the public authority of Statute. This is the doctrine of Erskine; and he cites a decision in support of it, although the contrary was afterwards found in *Bonar v. Lyon*, 20th February 1683, as it had been in previous cases, where disponents of land were found liable on eviction for glebes designed under the authority of a previously existing Statute. But the doctrine referred to has now been authoritatively fixed as regulating future augmentations of stipend, which, although imposed under a previously existing Statute, do not give a claim of warrandice, unless they are expressly specified as undertaken by the granter, because stipend and augmentations are burdens *in naturalibus* of the *dominium utile*, and in a feu-grant it requires express terms, admitting of no other interpretation, to take this burden off the vassal, and lay it on the superior; *Earl of Hopetoun's Trustees v. Coplands*, 8th December 1819, and previous cases cited in a note of the Judge's opinions, which rejected the decision in the previous case of *Earl of Hopetoun v. Jardine*, 3d July 1811. The general principle, that the

WHERE EVICTION NOT IMPUTABLE TO GRANTEE OF FEU.
M. 16,623.

WARRANDICE DOES NOT EXTEND TO NOTORIOUS PETTY LIABILITIES.
M. 16,606.

DOES WARRANDICE APPLY TO BURDENS IMPOSED BY PUBLIC LAW?
Inst. ii. 3, 23.
M. 16,606.

WARRANDICE AGAINST AUGMENTATION OF STIPEND.

F. C.

F. C.

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CHAPTER II.
12 D. 1077. parties cannot be held to have had in view burdens imposed under Statutes not existing at the date of the charter or contract is now conclusively sanctioned by the unanimous judgment of the Court in *Scott v. Edmund*, 25th June 1850, where a superior having bound himself in 1789 to relieve the vassal of all payment of teind, minister's stipend, and all public and parochial burdens whatsoever imposed and to be imposed on said lands, and public burdens having been imposed by statutes in 1812 and 1839, it was held that the vassal was not entitled to relief from assessments made under the authority of these statutes, but only from burdens imposed or to be imposed by virtue of laws in existence in 1789.

INTIMATION OF
EVICTION. Although no claim of warrandice arises before eviction, yet it is prudent to intimate the threatened eviction, and the proceedings under it, to the granter, in order that he may not have it in his power to object that a competent defence was omitted. But it is only as a discretionary step that intimation need be made, for it is no defence to the granter, that he was not made a party to the suit under which eviction took place, unless he can point out a plea which would have availed, and was not stated; *Clark v. Gordon*, 23d June 1681. When the objection to the title is glaring, the grantee has his recourse without making any defence, for no one is bound to maintain a right which is plainly untenable. This is one of the points decided in *Downie v. Campbell*, 31st January 1815. When the lands are let, the current leases are excepted from the warrandice, reserving to the grantee to impugn them upon any ground which will not give the tenants recourse against the granter.

M. 16,605.
F. C.
15 D. 436. As an example of warrandice incurred, reference may be made to *Russell v. Malcom, &c.* 25th February 1853. There minerals were sold with certain specified rights and privileges to the purchaser as regarded the use of the surface of the ground in working, carrying away, &c. Before the purchaser's right had been feudalized by conveyance and infeftment, part of the surface was acquired by a railway company, after whose infeftment the seller of the minerals could not give an effectual title to the rights and privileges stipulated, these being in some respects greater than those conferred by common law or by the Railway Clauses Act. The sellers were found liable in damages.

ASSIGNATION OF
WRITS.

PURPOSE OF
THE CLAUSE.

6. *Clause of assignation of writs and rents.*—(1.) The purpose of the clause of assignation of writs is to enable the grantee to vindicate his right against challenge, by shewing that his predecessors and authors have possessed the subject during the period of the long prescription upon regular and complete titles. When the circumstances allow of it, the titles are not only assigned, but delivered, and, by our previous practice, when they were delivered, a declaration of the fact was inserted immediately before the clause of registration. By the new statutory form the assignation of the title-deeds includes along

with it a declaration of the delivery. The words are:—"I assign the writs, and have delivered the same according to inventory;" and, by the 3d section of the Act, it is provided, that this clause, unless specially qualified, shall be held to import an absolute and unconditional assignation to such writs and evidents and to all open procuratories and precepts therein contained to which the disponent has right. Upon this it is to be observed here, that as the feu-charter generally conveys a portion only of the superior's lands, the titles remain with him, and, therefore, there can be no declaration of delivery. But the grantee's interest is secured by an obligation to make the titles forthcoming to him when required. And, again, as the bare assignation in terms of the Statute would impart an absolute and unconditional transfer of the writs and their clauses, but such a transfer might be inconsistent with the interest remaining to the superior for the rest of his property, the clause must be qualified, in order to limit the grantee's right to the titles so as to correspond with the grant. This, as regards both the assignation and delivery, may be accomplished by using the assigning words of the statute, thus qualified:—"And I

assign the writs to the effect of maintaining the said B., and his foresaids in the right of the subjects hereby conveyed; and, as the same cannot be herewith delivered up, I oblige myself and my foresaids to make them forthcoming to the said B. and his foresaids upon all necessary occasions, upon a proper receipt and obligation for re-delivery within a reasonable time, under a suitable penalty."

Such accommodation of the new clauses to the nature of the particular deed is clearly competent under the terms of the 1st section of the Act, which authorizes their adoption in the form, or, "as nearly as may be," in the form, set forth in the schedule; and the 3d section, explaining their import, expressly contemplates that they may all be qualified. Although the title-deeds are not delivered, it is very advisable that the grantee receive an inventory of them certified by the granter, which will both serve for evidence of the steps of the title, and save dispute when access to the deeds is required. The importance of right to the titles, and of securing access to them, is shewn by *Proctor v. Anderson*, 29th June 1837. Here, in a competition, a disposition and sasine were objected to as vitiated, but the title of the claimant's author being unexceptionable, that was held to protect him against the challenge, for, although his own title should be reduced, that of his author's remained preferable to the other claimants.

FORM OF
CLAUSE.USE OF ASSIGN-
ATION TO
WRITS.
15 S. 1219.

(2.) By the former styles the granter assigns the rents from and after a term specified, which is declared to be the term of entry. According to the new form, we have already seen that the term of entry is inserted at the end of the dispositive clause. Here, therefore, we may adopt the statutory form, viz., "*I assign the rents.*"

ASSIGNATION OF
RENTS.

The import of this clause has received an important qualification

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USE OF CLAUSE
OF ASSIGNATION
OF RENTS.

M. 2764.

M. 2902.

by the 3d section of the statute, but the effect of that will more properly claim our attention in treating of the disposition, as it is chiefly in sales of land that the qualification comes into force. As regards the feu-charter, it is sufficient to bear in mind that the clause now, as formerly, will give the grantee right to the rent of the subject for the possession after the term of entry, unless by the lease the rent for such possession was payable before the term of entry. The use of this clause is, that it gives the grantee the means of possessing a title to levy the rents, although he may not be infeft. By intimating this assignation to the tenant, the latter will be effectually precluded from paying to the granter. But it is carefully to be observed, that, while the right remains personal, the grantee not being infeft, it is subject to the hazard of being excluded by the completion of a real right in the person of a creditor or of another disponee of the granter, for a completed assignation of rents creates only a personal claim against the possessor, while a real right attaches the thing itself; and, therefore, a right completed by infeftment is preferable as regards rents not yet payable to a personal right by assignation or arrestment intimated or used of a previous date; *Huntly v. Hume*, 13th December 1628. It follows, therefore, that intimation is not necessary when infeftment is taken; and, in *Webster v. Donaldson*, 13th July 1780, a disponee infeft, but who had not otherwise intimated his right to the tenants, was preferred to the rents over an arrester.

WARRANTICE
OF ASSIGNATION
OF WRITS AND
RENTS.

According to the previous form, the assignation of writs and rents was followed by a clause of warrantice of that assignation, which, in the ordinary case, was absolute with regard to the writs—the title in conveyances of heritable subjects being the grand object of the warrantice—and personal with regard to the rents, implying that the granter has done, and will do, no act prejudicial to the grantee's right under the charter to receive the rents. But when the new form is adopted, and when the agreement of parties in regard to the warrantice of the writs and rents is of the nature we have stated, it is unnecessary to have any separate clause of warrantice here, for, by the 3d section of the statute, the general terms, "*I grant warrantice*," are declared to import absolute warrantice of the writs and evidents as well as of the lands, and warrantice from fact and deed as regards the rents. When there is any flaw or doubt in the title, of which the granter does not choose to take the risk, then the warrantice must of course be qualified so as to be only from fact and deed.

7. *Obligation to relieve of public burdens.*—By the previous form the granter obliged himself to relieve the grantee of all cess, stipend, and other public burdens, preceding the term of entry. The new form is:—"I bind myself to free and relieve the said B. and his foresaids of all feu-duties, casualties, and public burdens." By section 3,

these words, unless specially qualified, are held to import an obligation to relieve of all feu-duties, or other duties and services or casualties payable to the superior, and of all public, parochial, and local burdens, due from or on account of the lands prior to the date of entry. The new form differs from the old chiefly in specifying feu-duties and casualties. But it may, notwithstanding, be used even in an original charter, as it will there necessarily signify relief to the grantee of the duties and services which may be payable by the granter of the charter to his own over-lord.

8. *The Clause of Registration.*—By the Act 1693, cap. 35, it is declared, that charters granted by subaltern superiors may bear a clause of registration on which registration may follow, but only in the books of Council and Session, and in no other record. This statute is still in force, and it will, therefore, be proper, in using the new form, which is :—“*I consent to registration hereof for preservation*”—to qualify it by inserting the words, “*in the books of Council and Session only.*” No doubt the registration would be so restricted by the operation of the early statute ; but it will be proper to preserve the distinction of the charter from other deeds in this respect, which would not be done by the use of the new clause without qualification, because its import is, by the 3d section, made equivalent to that of the old clause in the usual terms. The early statute is limited to the charters of subject superiors, because Crown charters are inserted in their own registers of the Great and Privy Seals.

9. *The Precept of Sasine.*—The next clause is the precept of sasine, which embodies a command or warrant from the superior for the delivery of possession of the lands to the vassal. This part of the deed is of essential importance, because it furnishes to the grantee the only direct means of obtaining feudal possession and making his right real. A charter without a precept forms a good personal obligation against the superior, but it does not empower the vassal immediately to divest him of, and clothe himself with, the *dominium utile*. For that purpose it would be necessary either, that the superior should grant a supplementary deed containing a warrant to infeft, or, if such a deed cannot be obtained, that the grantee complete his right by process of law, the Court adjudging in implement—a judicial remedy, as we shall afterwards find, to supply the defects of deeds, which, because wanting the necessary feudal powers, are called imperfect conveyances.

We have seen that until the introduction of the improper investiture, no mandate from the superior was requisite, because in his own person he attended upon the ground and gave possession, and the written title, when it first arose, was a posterior attestation of the fact. After the adoption of the written commission or mandate by

IMPORT AND
IMPORTANCE OF
THIS CLAUSE.HISTORY OF
PRECEPT OF
SASINE.

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the superior, the delivery of possession was held to be sufficiently proved by the seal of his baillie, (a term derived from the French "*bailler*," to deliver,) affixed to the *breve testatum* or charter, or by the baillie's separate attestation, of which we have already referred to an example. At last, the advantage of written titles being more and more felt, they assumed by degrees a consistent form, and for a period of 200 years this consisted of a charter with a separate precept delivered to the vassal, upon which infeftment followed. Thus the feudal investiture consisted of three instruments—the charter, the precept, and the attestation or instrument of sasine. It would appear, however, that the precept was not regarded or preserved with the anxiety due to an essential portion of the title, for, in 1594, an Act was passed to obviate the frequent loss of precepts, by ordaining that forty years' possession upon a sasine should form a prescriptive title without production of the precept. This inconvenience was first remedied in the case of Crown charters by the Act 1672, cap. 7, directing the insertion of the precept of sasine in the charter itself towards the end; and the rule was extended by practice to charters by subject superiors also.

1594 c. 218.

1672 c. 7.

OLD FORM OF
PRECEPT.

The precept by the old form contained a desire by the superior to his baillies, whose names were left blank, to pass to the ground of the lands, and there to deliver to the grantee, or his heirs or assignees, heritable state and sasine, real, actual, and corporal possession, of the lands, by delivering to them or their attorney who should produce the charter earth and stone of the ground, a handful of grass and corn for the teinds, with all other symbols usual and necessary. This is the substance of the clause, the formal words will be found in the Style-book.

vol. iii. p. 17,
4th Edⁿ.

MODERN FORM
OF PRECEPT.

The form of the precept, as well as that of the instrument, has been materially altered. The change was effected by the Act 8 & 9 Vict. cap. 35, which, by schedule A, prescribes the following as the form of the precept of sasine:—"Moreover, I desire any notary-public, to whom these presents may be presented, to give to the said B., or his foresaids, sasine (or *liferent sasine*, or *sasine in liferent* and *fee respectively*, as the case may be) of the lands and others above *disponed*." By section 5 it is provided, that a precept in this form, or as nearly as may be in the terms of the schedule, shall be as valid and effectual as the precept before in use. The ultimate effect of the new form is the same as the old, and the difference in the style is attributable, as we shall find when we examine the instrument of sasine, to changes introduced by the same Act in the mode and ceremony of giving sasine. The essential point of the delivery of possession is directed by both. All the changes are in the circumstantialia:—
(1.) There is no baillie named in the new form, because in his place the notary-public is the commissioner desired to give infeftment.
(2.) There is no direction to proceed to the lands, because that part

of the ceremony is abolished by the Act, and sasine may be given anywhere. (3.) There is no delivery of symbols, for these also have been practically abolished. (4.) There is no reference to the grantee's attorney, because by the new form no appearance by an attorney is requisite, it being only necessary, that the conveyance containing the warrant be presented to the notary-public.

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We shall now examine the material points which require to be attended to in regard both to the old and new forms of the precept, for it will be the practitioner's frequent duty to ascertain the accuracy of titles prepared under the previous form, as well as to direct the preparation of deeds under the new.

The blank mandate to the granter's baillie was not limited to any person or description of persons, and any one was qualified to execute it by giving possession.

WHO MIGHT
ACT AS BAILLIE.

It is an essential requisite of the precept, that it contain distinct and special power to give sasine to the grantee, and any general power, however ample, to act on behalf of the granter will be unavailing, unless there be a specific authority to give sasine.

THERE MUST BE
SPECIAL POWER
TO GIVE SASINE.

It is prescribed by a note to Mr. Erskine's Institute, that the vassal must be specially named and designed, (that is, of course, either in the precept or in the deed which contains it,) upon the authority of *Blackwood v. Earl of Sutherland*, 7th November 1740, and that case appears to sanction the doctrine, a sasine having been found null, which proceeded on a precept for infefting the representatives of A. and B., without particularly naming and designing these representatives; but the report is very brief. On the other hand, Mr. Bell in his Principles says, that it seems not necessary that the person should be named, provided he be sufficiently distinguished and identified; and, accordingly, upon the question, whether a precept to infeft the heirs of A. is a sufficient warrant for a sasine, he holds that, although the sasine is bad, if taken in the same terms—that is, without naming the heir to whom infeftment is given—(of which, upon the authority of *Blackwood*, and other decisions, there can be no doubt,) yet, if the party infeft is named in the instrument, and his character as heir established by a service recited in the instrument, that seems to be sufficient. The authority referred to in justification of this opinion is *Melville v. Smiton's Creditors*, 24th February 1794. This view, however, can only be deduced inferentially from the report of that case. In the case of *Denniston, Macnayr, & Co., v. Macfarlane*, 16th February 1808, a precept in favour of one person *nominatim*, and the other partners of a company not named, was held sufficient only to invest A., and not the other partners. The validity of the infeftment here depended entirely upon the fact of an individual being named in the warrant. Had it been in favour of “the partners of Messrs. Murdoch, Gordon, Gillies, & Co.,” or in favour of “Messrs. Murdoch, Gordon, Gillies, & Co.,” it would have been void,

VASSAL'S NAME.
ii. 3, 33.

M. 14,327;
2 Ross, L. C. 18.

§ 876.

M. 14,327;
2 Ross, L. C. 22.

M. voce,
“Tack” App.
No. 15; 2 Ross,
L. C. 23.

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Hume, 720.

the principle being fixed that a company cannot sustain the feudal relation. Of this there is a distinct example in *Morrison v. Miller*, 18th June 1818, where a sasine in favour of "Robert Muirhead & Co." was held invalid.

PRECEPT MUST
DEFINE LANDS.

The precept must either in itself, or by implied reference to another part of the deed, define the lands of which possession is to be given. It is not indispensable, that there be a full description, or, indeed, any specific description. But the lands must be so indicated, that they can with certainty be ascertained; and they must be identified in the act of infestment. Thus, a conveyance of "all the lands belonging to me" with a precept of sasine, is a sufficient transmission and warrant of infestment, provided my infestments be produced to the notary in order to ascertain and identify the lands. The authorities for this we shall afterwards find. In the meantime reference may be made to *Wallace v. Dalrymple*, 23d June 1732. There was here an obligation to infest in security of an annuity out of certain lands specified, and furth of all other lands belonging to the granter in the Shire of Ayr. The notary comprehended in the instrument of sasine both the lands particularized, and others contained in the granter's infestments. According to the principle which has just been stated, if the infestments of other lands had been produced to the notary, and his instrument had certified that fact, this infestment would have been sustained with regard to all the lands. But the sasine was found null as to all the lands other than those particularly expressed; and we are thus taught, that, whenever the deed containing the precept is to form the only warrant of infestment, it is necessary that it, or the deed of which it forms a part, define the lands, so that they can be identified without reference to other documents.

M. 6919;
2 Ross, L. C.
81.

It is also necessary to remember—and this, like the other observations just made, applies to the new form as well as the old—that the infestment or sasine authorized by the precept ought to be of the nature intended to be given. A warrant to infest in liferent is no authority for infestment in the property or fee. We shall see afterwards, that one having right to a precept authorizing infestment in the fee of property may assign it, so as to give a limited right of liferent or in security; but the rule should be to express in the precept the character and extent of the infestment which it is intended to warrant.

AUTHORITY OF
GRANTEE'S
ATTORNEY TO
RECEIVE IN-
FESTMENT.

Under the old precept, which authorized infestment by delivery to the grantee's attorney as well as himself, any one holding the precept was presumed sufficiently entitled to receive possession without any special power, because that was an act beneficial to the grantee. But it was justly held competent to prove that the person acting as attorney was not authorized, if the act should be prejudicial to the grantee. Of this Erskine cites an example from Craig of a creditor, who caused infestment to be taken in favour of the heir of his deceased

Ersk. Inst. ii.
3, 33.

debtor, in order to subject him in a universal passive title for his ancestor's debts. The fraud being proved, the infeftment was annulled. Although the new form has no reference to an attorney, the same principle will no doubt be recognised in regard to the authority of the person who shall present the charter or other conveyance to the notary for infeftment. This may sometimes be a point of great importance in acting for absent parties, or otherwise, without exact powers. ' PART III.
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The precept of sasine is followed by the testing-clause, which we have already examined. TESTING
CLAUSE.

Before concluding the subject of the charter, it is proper to call to mind the principles already laid down with regard to the delivery of deeds. No charter or other conveyance confers any right, although it has been executed, unless it is also delivered. Of this an illustration is afforded in the case of *Brown v. George*, 22d February 1842; 4 D. 746. and, in *Gray*, 13th December 1838, an undelivered deed having been borrowed from a process, and infeftment surreptitiously taken and recorded, the Court upon a complaint directed a marking to be made on the margin of the register, that the sasine was judicially challenged, and prohibited the notary from expeding any new sasine. It is probable, that the sense of the Court would have been expressed yet more strongly, but that the party who had directed the infeftment died before the complaint was heard, and his son, in whose favour the infeftment was taken, was abroad. 1 D. 227.

II. THE INSTRUMENT OF SASINE.

The charter gives to the grantee a good personal right to the subject of the grant. It forms a complete obligation upon the granter, who is debarred from granting any deed inconsistent with it. But, as long as the right stands merely upon the charter, its strength depends upon the personal obligation of the disponent. The charter, before its existence is published by infeftment, is a private instrument, and of no effect against third parties, who, knowing nothing of it, are under no obligation to regard the subject as transferred from the granter who holds the public right; nor can it by any registration be rendered obligatory against third parties, for by its nature it is not an instrument of completed possession. It is only, as regards possession, a warrant to deliver it. If, therefore, another party shall procure a second charter or other conveyance, and do what the law requires for the completion of his right, before that under the first charter is perfected, then the prior grantee is excluded, and his only remedy is by recourse upon the granter personally—a remedy which, of course, must depend upon the sufficiency of the granter's means. How, then, can one provide against a risk so serious? By doing

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DELIVERY OF
SUBJECT CON-
VEYED NECES-
SARY.HISTORICAL
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LIVERY OF
SASINE.

that which we found to be essential to security in the purchase of moveables, viz., obtaining delivery of the subject. The mere *emissio verborum* is insufficient to dissolve the right of the granter. That can only be done by divesting him of the subject. This is a fundamental principle in conveyancing, and it is embodied in the familiar maxim, "*Traditionibus, non nudis pactis, dominia rerum trans-feruntur.*"

It is easy to perceive how deeply inherent in the idea of property this principle must have been in the period before civilisation, when indeed occupancy constituted the only title; and that the notion of a right not made manifest by seizure and uninterrupted personal possession was much too refined to gain a place before a comparatively advanced stage of civilisation. And the same test of ownership has still continued in the most advanced periods of civilisation to be received, although under different modifications as regards the manner of possession. We have first the original kind of possession, which consists in personal delivery to, and occupancy by, the recipient. Of this the early practice under the feudal system affords, as we have seen, a remarkable example, the evidence of the title being reposed in the memory of the *pares curiæ*, witnesses to the feudal contract, to the vassal's homage, and the delivery of possession to him by the superior's act upon the ground; and long before the feudal customs were settled, expedients were used to secure such transactions by a vivid impression on the memory. Thus, we read in the *Lex Ripuariorum*, which prevailed in Italy about the year 630, that, if the purchaser of a property could not obtain a judicial instrument of the transfer, he must proceed to the ground with six witnesses if the subject was of moderate size, three if it was small, and, if large, with twelve, taking along with him also an equal number of boys, and in the presence of these he was to pay the price and to receive possession, at the same time whipping each of the boys, and pulling their ears, in order that, having the transaction thus forcibly impressed upon their minds, their testimony for the future might be secured. We have relics of a similar practice in some parts of Scotland, where annual solemnities are observed in connexion with particular localities, for the purpose of preserving the recollection of territorial boundaries. Among the Anglo-Saxons the grand division of property was into *Boc-land*—*terra libraria*—of which the title was written, and *Folk-land*, the title of which consisted in the knowledge and memory of the neighbourhood without any written title. Of a similar nature is the udal tenure, in which the title is perfect without writing. In these various instances, the transmission of land necessarily consisted in the delivery of possession to the party acquiring it.

The manner of delivering possession would afford materials for an elaborate and interesting historical inquiry. The theory of Sir John

Dalrymple, that, as immoveable property cannot be transferred from hand to hand, like moveables, it was transferred by putting the intended new proprietor into possession by placing him in or upon the subject itself, is supported both by natural probability and by the instance which he cites from the *leges burgorum*, which will be found printed from the manuscript recovered from the canton of Berne in 1814 in the first volume (large edition) of the Acts of the Parliaments of Scotland. It is to this effect :—"Whosoever shall sell his land or a part of it shall himself as seller be inside the house and go out, and the other, who is the buyer, shall stand without and go in ; and each of them is to give the provost a penny, and two pence when it is an excambion, the seller *pro exitu*, and the buyer *pro introitu suo et saisinā*." In like manner we read, that, when fortalices were held as separate tenements, the form of delivering possession was, that the granter came out of the gate, and the grantee entered and shut it. Such a ceremony, however, though suitable enough to mark that the one party was denuded, and the other invested, in the case of a house or castle, was not so well fitted to testify the same facts in a transference of lands ; and, accordingly, the earliest traces which are preserved of actual delivery upon the ground indicate a variety of other expedients. In the *Appendix formularum* to Marculfus (in a note to the 19th) various modes of delivery are stated, and of these probably the earliest is that of drawing a plough round the limits of the land sold—a formality appealing to the same mode of distinct ascertainment by which the limits of Carthage were fixed, when Dido was permitted to appropriate as much land as she could enclose within the thongs of one bullock's hide—or the boundaries were otherwise marked out, or the parties repaired to the four corners of the field, and the seller took a portion of earth, or grass, or branches, if there was wood, which he delivered to the purchaser, pronouncing the words, "*Ego tibi tradidi, et legitime firmabo*."

These ceremonies, in so far as regards the delivery of a portion of the land or its produce to the purchaser, have been said to constitute symbolical delivery, and the theory of its origin has given rise to controversy, Lord KAMES being of opinion, that delivery by symbols marks the period when the purchaser's right was made complete, although he did not enter into the actual, which in legal language is called the *natural*, possession, but became proprietor by force of the title, although not personally occupying the subject, which is called *civil* possession. Mr. Ross severely censures this idea, affirming with a confidence which does not appear to be justified by the authorities, or in accordance with the philosophic observance of, and submission to, the evidence of records by which his writings are in general so remarkably characterized, that the symbols delivered for many ages had no relation, and but seldom any resemblance, to the possession of

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land. The fact upon which chiefly Mr. Ross depends is the use of the *festuca* or *fustis* (the prætor's rod) as the symbol of delivery. It is to be observed, however, that, according to the Roman law, as is shewn by Mr. Ross himself, the transmission of property was effected by a judicial act enrolled in the books of the magistracy; and it is not unreasonable to suppose, that the use of the *festuca* took its origin in this judicial proceeding. Mr. Ross refers to the form of a remarkable instrument of sale preserved by Brissonius, where this symbol is used. The parties are present with the notary, who certifies the instrument and the facts; and the transmission is made by the parties obeying the directions of the notary given to them in these words, "*Tu, Pascuti, fuste illum investito : Tu, Sequiti, fustem manu capito.*" But there is nothing in this instrument shewing that this procedure took place in the present case upon the premises, and it appears admissible to conclude, that the notary, acting judicially in directing this emblematic transfer, used the ordinary legal symbol of judicial transmission. This is not inconsistent with the view adopted by Mr. Ross elsewhere, that the *festuca* was used as the emblem of authority, betokening the transmission of the allodial *dominium*, for that was a natural result of the original adoption of this symbol in Court. The opinion, that, in the tradition of lands, there was originally the element of delivery of part of the substance, is strongly supported by the Formularies of *Marculfus*, two of which bear delivery of the natural symbols, earth, or grass, or turf, as well as of the *festuca*, the latter symbol being apparently used in connexion with the exit of the granter, which countenances the idea of its symbolizing a transfer of authority. It is in harmony with this view, that the baton has remained until now the symbol in resignations—the only transfers of land, which, until the recent change in the law, could be made elsewhere than upon the ground of the lands—and that by our practice, until recently, delivery could only be made on the ground of the lands, because it was held to be a real tradition of the subject.

Appendix, Nos.
 19 and 43.

The view of delivery by things or emblems, as involving delivery of the whole through the medium of a part, is strengthened by the mode in which conveyances were sometimes completed, even when the ceremony did not take place on the ground of the lands. In gifts of lands to the Church, for instance, delivery was made by laying a turf upon the altar, or a little earth was taken and received by the hand of the prelate in the skirt of his mantle, or placed upon the altar in the presence of witnesses.

Marculf's Form.
 App^x. No. 19.

There is no doubt, however, that, whatever may have been the original idea, the form of delivery of land was, in many instances, purely symbolical, and various articles were adopted as symbols, which had little or no connexion with the subject of the transfer.

Generally, the symbols used were such as were most at hand either upon the ground or apart from it. In some instances we find emblems bearing a reference to the chase, as the spear, bow, and arrow, and Edward the Confessor granted to an Abbey a manor by a knife fixed perpetually on the high altar. Implements of war were appropriate symbols of delivery in tenures by knight's service; and so we meet with the gauntlet, sword, helmet, and horn. Of the last an instance may still be seen in York Minster; and Mr. Ross notices a charter of the lands of Arnprior held "*virtute gladii parvi*," a royal gift in acknowledgment of services of singular merit. Then, there are other symbols undoubtedly appropriate to particular features of the subject, as a cask of salt water for lands lying on the sea-shore; and others again evidently taken merely from their readiness at hand. For the latter practice the authority is very ancient, for we read in the Book of Ruth, that, in transferences, "a man plucked off his shoe, and gave it to his neighbour, and this was "a testimony in Israel." In like manner we have the glove of the granter, or his ring, or the parchment, ink-holder, or pen, which last is the symbol used in modern times in place of the baton. Of the act of giving possession with the use of a symbol most readily found, we have a picturesque example in the renewal of a grant by Guido, Count of Poitiers, to a monastery. It is dated in the year 1068, and is not, therefore, cited on account of its antiquity, but as containing evidence of the natural history of transmission which all must feel to be genuine. The instrument is called a *concessio*, and the introductory part is in the first person, the granter of new giving the lands, as he and his mother had held them and given them, to the monastery of the Holy Family, that the grantees and their successors might hold them by the surest confirmation. Here the deed makes a sudden transition to the third person, and proceeds:—"Tunc inclinavit se comes, et accepit viridem scirpum, nam domus recenter erat juncata, sicut solemus facere, quando aliquem personæ potentis vel dominum suscipimus, vel amicum. Tunc junco ipso, non tam donum faciens, quam restaurationem, dedit duobus fratribus qui præsentés ad-erant," &c.

While the symbols of delivery have been thus various and arbitrary, there is no doubt that Mr. Ross is right in designating as a capital feature common to them all, that they were delivered by the granter or seller, and, whether intended to represent the subject or not, they were all expressive of the granter's will and finished act in divesting himself and delivering the property to the other party. This characteristic of the delivery, viz., its effect in divesting the granter, does not appear in express terms in our instrument of sasine, but it is of great importance to keep it in view, as a chief object and result of that instrument. It is clearly marked in the Formularies of *Marculfus*,

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HISTORICAL
SKETCH OF DE-
LIVERY OF SA-
SINE, CONTD.

Marc., Note 2
to Book I.,
Form. 18.

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from which our own are so manifestly derived. The shortest of these forms is No. 57 of the appendix. It is called *Notitia traditionalis*, and the facts are described in these words:—" *Visus fuit tradidisse* " *et EXITUM INDE FECISSE*;" and, in No. 43 of the appendix, there is another *notitia*, in which the delivery is by grass and turf through the door, and a declaration, by the delivery of the *festuca*, of the exit of the granter. No. 19 is of similar purport; and the note of Bignon is very instructive for our present purpose, for it informs us, that, in place of "*exitum fecisse*" some read "*Se exutum fecisse*," i.e., that the granter had unclothed or divested himself, to the end that the other might be invested.

In proceeding to treat of the instrument of *sasine*, we are to keep the same principle steadily in view, that the essence of infeftment or *sasine* is not limited to the establishment of actual possession in the vassal, for that he may obtain, although the real right remains in the superior's person. The essence of it is, the delivery of possession by the superior, or by virtue of his warrant, whereby the right which was in the superior passes by a real transference into the person of the vassal. This effects the completion of the right, which is described by Blackstone as *juris et sasinae conjunctio*.

INSTRUMENT OF
SASINE, WHEN
INTRODUCED IN
SCOTLAND.

It is doubtful when the instrument of *sasine* was first introduced into Scotland. Sir Thomas Craig supposed it to have been by James I. on his return from England, but we have already had occasion to refer to documents which prove that it was in use at an earlier period.

ITS DEFINITION.
Inst. ii. 3, 34.

It is defined by Mr. Erskine, an attestation by a public notary that possession was given by the superior or his baillie to the vassal or his attorney by the delivery of proper symbols. Since, by the recent Statute for facilitating the giving of infeftment, most of the formalities referred to in this definition have been practically abolished, it may now be described simply as an attestation by a notary-public that *sasine* or possession has been given. It is a solemnity essential in all cases to the first constitution of the feudal grant, and generally to the completion of all transmissions of heritable subjects held by the feudal tenure. No proof of possession by the vassal can supply the place of the *sasine*. Until by it delivery of possession is legally made, the superior, although personally bound by the charter, continues vested in the feudal estate, and that is only taken out of his person by the *sasine*, which is thus an indispensable solemnity.

SASINE ESSEN-
TIAL TO COM-
PLETION OF
RIGHT.

SASINE BEFORE
8 & 9 VICT. C.
35.

1. *Sasine under the old form*.—In examining this instrument, we shall, first, inquire into the ceremony and the form of the instrument which prevailed previous to the Act 1845, 8 & 9 Vict. cap. 35, passed

“to simplify the form, and diminish the expense, of obtaining infeftment.” As this Statute has all but annihilated the ceremony, and made essential changes in the nature and form of the instrument, the Conveyancer would gladly forego the task of investigating what has thus been superseded; but this is a labour which cannot be dispensed with. In every progress of titles which he will be called upon to examine, it will be his duty to ascertain whether the legal rules and forms by which instruments of sasine were formerly governed have been duly observed in such instruments as are of a date previous to the Statute; and, as the change in the ceremony and form will deprive him of the means which practitioners have hitherto enjoyed for keeping the rules and observances fresh on the memory, so it is the more needful, that he fix in his mind at present a thorough knowledge of these, so clearly defined as to serve afterwards for constant reference and guidance. We have also to repeat here the remark, which is so common in regard to changes of the law, that a knowledge of what is removed is essential to the understanding of that which has come in its place.

The Ceremony of giving sasine, and form of the Instrument.—By the previous practice, sasine could only be given upon the ground of the lands conveyed, and the ceremony was as follows:—A notary appeared along with two other persons, one of them acting as procurator or attorney for the grantee, and the other as baillie appointed by the granter. The procurator produced the charter or other warrant, and required the baillie to execute his office. The latter received the deed, and delivered it to the notary-public to be read and published, after which the baillie took it back, and gave possession to the grantee by delivering to his attorney earth and stone of the ground, and any other symbols appropriate to the nature of the right. Then the attorney took instruments in the hands of the notary by giving to him a piece of money, which inferred a protest and declaration that sasine had been delivered to his constituent, as well as a demand upon the notary to extend an instrument attesting the facts. This concluded the ceremony, which was performed in the presence of two witnesses specially called for the purpose. The notary then extended the instrument of sasine, which contained a narrative of the whole transaction, embodying the necessary portions of the warrant, and was attested by his own signature and docquet, and by the signatures of the witnesses. We shall now examine the instrument as contained in the Juridical Styles.

THE FORM OF
THE OLD IN-
STRUMENT.Vol. i. p. 59,
4th Editⁿ.

It begins with *The Invocation*—“*In the name of God, Amen*”—first introduced by Justinian, and used, Lord Stair says, that it may keep the notary in mind of his faith and trust, deterring him from taking the name of God to a falsehood or lie. Next, it sets forth the day, month, and year, of God, and also the year of the Sovereign’s reign.

THE INVOCATION.

DATES.

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3 D. 216.

6 D. 771.

15 D. 708.

Hume, 925.

The origin of the insertion of these two dates is explained by Craig, ii. 7, 12, and by Ross, ii. 180. It is a settled point, that both of these dates must correspond; *Town Council of Brechin v. Arbuthnot*, 11th December 1840; and this was held also in a case where the year of the era was correctly stated, but the year of the King's reign was one which never existed; *Lindsay v. Giles*, 27th February 1844. Here the opinion will be found expressly stated upon the Bench, that the two correct dates are essential. But, in the case of *M'Farlan*, 2d June 1853, the sasine not containing the year of the Christian era, and that of the King's reign not being correctly specified, the instrument was found null, but the Court did not enter upon the question whether both dates are essential; and Lord CURRIEHILL in his note holds that point not to have been decided. In the case of *Dickson's Trustees v. Goodall*, 15th December 1820, the day of the month had been omitted, the month and year being correctly stated, and the instrument was recorded before the expiration of the month of the date. An objection to the validity of the instrument was repelled, on the ground that the case involved no question of deathbed, or bankruptcy, or competition. But the decision was not unanimous, and Baron Hume questions its accuracy in the note at the end of the report where this point is stated; and, no doubt, it must be regarded by the Conveyancer as a questionable defect in an instrument under the former practice, which demanded publicity in the ceremony, that it should not declare the day upon which it was performed. We shall defer for the present noticing vitiation of the date by erasure, as we shall have occasion afterwards to point out the statutory remedy for that defect.

COMPEARANCE
OF PARTIES.

NOTARY.

10 S. 85.

WITNESSES.

ATTORNEY.

The instrument next sets forth the *compearance of parties*. The first essential is the presence of a notary-public. This is matter of solemnity, and indispensable. Lord Stair says:—"Though the superior with a thousand witnesses should subscribe all the contents of a seisin, it would be of no effect to make a real right without the attest of a notary;" and it is to this he ascribes the force of the maxim, "*nulla sasina nulla terra*." Any notary-public may officiate at the giving of sasine, unless he have an interest in the transaction. In discussing bills of exchange, we found that interest is a valid objection to a notary, although relationship is not. In the case of *Sim v. Clark*, 2d December 1831, a question was raised, whether the disponent had validly officiated as notary. Lord GILLIES gives a distinct opinion that this is no objection; but the point does not appear to have been adverted to by the other Judges, or in discussing the appeal in the House of Lords. Along with the notary are present the witnesses; and the parties compearing are, first, a person named and designed as procurator or attorney for the grantee. The instrument bears, that his power of procuratory was sufficiently

known to the notary. At a remote period, the appointment or warrant of an attorney required to be purchased from Chancery, because disputes respecting lands could only be settled by single combat of the parties, and, in case of sickness or inability, a champion or attorney could only be obtained by the King's authority. An instance of the letter of attorney under the Great Seal occurs in the instrument, No. 4 of Mr. Erskine's appendix, already referred to, which shews, that, after the trial by single combat had ceased, the practice still continued of issuing letters of attorney from Chancery as an authority to receive sasine. Now, as we have already had occasion to remark, any one may act as attorney, with this qualification, that, as the party infest may be injured by the act of infestment, it will be open to him to shew that the person taking upon himself the office of attorney acted without authority. The party acting as baillie for the superior must also be named and designed. In *Morton v. Hunters & Co.*, 10th December 1828, it was objected to a sasine that the Christian name of the baillie was left blank. His surname and residence being given, the objection was overruled, and this judgment was affirmed 26th November 1830. The report of the Lord Chancellor's speech in this case explains the distinction, first introduced by Lord BACON, between patent ambiguity and latent ambiguity. Patent ambiguity declares itself; it appears upon the face of the instrument. Latent ambiguity is that which must be averred and proven, in order to be seen. So, in this case, "Brown in Dubbs," the description of the baillie is a latent ambiguity, because there is no reason to suppose that there was more than one "Brown in Dubbs," till an averment to that effect be made, and proof offered. The instrument next bears, that the attorney held in his hands the charter, (or other deed containing the warrant,) and there is inserted here a narrative of the charter. This narrative sets forth the fact of the conveyance, and the description of the lands as in the charter. It has been the practice sometimes to insert all or most of the clauses of the charter, but such a course is to be reprobated, and is not creditable to the Conveyancer's intelligence and skill. The purpose of the instrument of sasine is to attest delivery in terms of the precept, and it is obvious that for that end it is quite unnecessary to narrate the cause of granting, or *tenendas*, or *reddendo*, or clause of warrandice. The correct rule, and it requires to be kept in view now as well as formerly, is to insert just as much in narrating the charter as is requisite to render explicit the intention and effect of the precept, and its fulfilment. When the charter is the only warrant, it is unnecessary to set forth its date in the narrative, for that will appear in the transcript of the precept of sasine and testing clause, which are inserted at full length. We shall afterwards point out the cases in which the dates of warrants must be narrated. When the disposition has been recorded

BAILLIE.

7 S. 172.

4 Wil. & Sh.
App. 389.NARRATIVE OF
CHARTER.

- PART III.** before infestment, the date of recording may be inserted in the narra-
CHAPTER II. tion; but it is not essential, and an error in stating the date of
 13 D. 1381. recording was held no objection to the validity of the sasine, in *Gordon's Trustees v. Eglinton*, 17th July 1851.
- ATTORNEY'S** There is next the requisition of the attorney, who exhibits the
REQUISITION. charter to the baillie, and requires him to execute his office; and then
DELIVERY OF follows the delivery of the warrant by the baillie to the notary, to be
WARRANT. read and published; and then the precept of sasine is inserted, being
 engrossed *verbatim*. In the case of *Lady Lancertown v. Laird of Pol-*
 M. 14,309. *wart*, 23d December 1680, a sasine was sustained, though not containing
 the precept; but the report bears that it would have been otherwise
 in a competition, and that, if the notary had been alive when the case
 came before the Court, he would have been deprived of his office for
 the irregularity. This is a solitary decision, and universal practice
 has established it as an undoubted rule, (rendered imperative by
 Statute under the new forms,) that the precept must be inserted. The
PRECEPT OF testing clause is also engrossed *verbatim*, in order to connect the war-
SASINE AND rant produced as the attested deed of the grantor with the delivery
TESTING given in pursuance of it. When the precept, however, contains a
CLAUSE ARE description of the lands, and the sasine is intended to complete a real
ENGROSSED. right, not to the whole, but to a part of them, it has been held suffi-
 cient to insert only as much of the precept as relates to that part of
 the lands of which infestment is given; *Don v. Waldie*, 4th February
 1813.
- F. C.** The instrument next contains the *clause of delivery of sasine*. It
 bears that the baillie received back the charter containing the precept,
 and, by virtue thereof and of his office, gave and delivered to the
 grantee heritable state and sasine, real, actual, and corporal possession
 of the lands with the parts and pertinents, by delivery of earth and
 stone, other symbols being specified if required. The words, "*heritable*
 "state" and "sasine," are meant to distinguish our infestment in the fee
 of the property from the precarious grants in the early history of feus,
 which could be resumed by the superior at pleasure, and also from those
 in which the grant was limited to the life of the vassal. The property
 bestowed is indefeasible, not terminable by the death of the vassal,
 but descendable to his heirs. "Heritable state," therefore, is ex-
 pressive of the permanency of the grant. This clause is the keystone
 of the sasine, for it contains the essential point of the assertion of de-
 livery. If it fails, therefore, the rest is of no use, for then the delivery
 is not attested. Of this there is a distinct illustration in *Davidson v.*
CLAUSE OF *McLeod*, 14th November 1827. Here that portion of the instrument
DELIVERY OF had been omitted, which bears that heritable state and sasine, real,
SASINE. actual, and corporal possession, were delivered, but the delivery of the
 symbols was complete. The opinions of the whole Court were taken,
 and the error held fatal. The feudal principle upon which the sasine
- ITS IMPORT-**
ANCE.
- 6 S. 8.

is founded are very distinctly stated in the report of the argument in this case. PART III.

The appropriate symbols requiring to be delivered for different descriptions of property were these:—For land, earth and stone; for a mill, clap and happer; for fishings, net and coble; for teinds, a sheaf of corn; for a patronage, a psalm-book and the key of the church; for an annual-rent, if consisting of money, one penny money, if consisting of victual, a parcel of corn or victual; (Mr. Ross advises the use of both these symbols in this case;) for houses within burgh, hasp and staple; and in resignations, staff and baton. Instances may be found of early decisions supporting sasines although not specifying delivery of the appropriate symbol, but these are not to be confided in. The case of *Town Council of Brechin v. Arbuthnot*, 11th December 1840, 3 D. 216. shews the fatal effect of errors in this point, a sasine of land being held void because it did not bear delivery of earth and stone, but of stone only. When the charter contains various distinct kinds of property, as lands, and fishings, and a patronage, the symbol appropriate to each must be specified, unless the whole be held under a Crown charter with a clause of dispensation declaring the delivery of one symbol sufficient for the whole.

The next clause specifies the taking of instruments:—“*Whereupon, and upon all and sundry the premises, the said attorney asked and took instruments in the hands of me notary-public.*” The taking of instruments is a legal method of certiorating a fact, the preservation of which a party deems important or essential for his security. So, when a meeting adopts a resolution which any of its members deem illegal, they may protest, and take instruments in the hands of the clerk, which amounts to a declaration of the fact, that they are no parties to the measure, but protest against it. The instrument in such case is the record of their protest in the minutes, of which they may obtain extracts to instruct the fact of their protest. In the sasine, the instrument is the extended writ, and the sense of the clause is much more apparent in the Latin form of the instrument than the English:—“*Dict. actornatus a me notario publico instrumenta sibi fieri petiit.*” The giving of a piece of money is supposed originally to have formed payment by anticipation of the notary’s charge, or a part of it, for expediting the instrument. CHAPTER II.
SYMBOLS OF
INSTRUMENT.

The clause following declares, that the things contained in the instrument were so done upon the ground of the lands between two specified hours of the day previously given as the date. Sasine required to be given upon the ground of the lands. This was essential in all sasines before the recent Statute, unless by virtue of special exemption, an instance of which Mr. Erskine points out in the sasine of Nova Scotia in favour of Viscount Stirling, which, by dispensation from the Crown, was allowed to be taken at the gate of the DECLARATION
THAT SASINE
GIVEN UPON
THE LANDS.

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Hume, 723.

Castle of Edinburgh. It would be relevant evidence to reduce a sasine, if it were proved, that, notwithstanding the notary's assertion of the fact, it was not in truth taken upon the ground of the lands. Such evidence, however, must establish a clear and undoubted error, and it is not favourably received at a distance of time. In *Campbell v. Campbell*, 9th June 1819, an objection being made to a sasine, that it was not taken on the ground of the lands, proof was offered, that the ceremony had not truly been performed upon the subject, but on a contiguous spot of land at a few yards' distance; twelve years having elapsed, however, since the date of the sasine, the Court refused to reduce upon such evidence. Baron Hume adds, in a note to this report:—"It is not to be inferred that the like judgment would have been given if the alleged irregularity had been of a gross or wilful sort, as, for instance, that the notary and parties never went near the lands in question, or upon any spot which could possibly be mistaken for a part of them."

SEPARATE ACTS
OF INFESTMENT
NECESSARY :—

If delivery required to be made more than once, this fact was made to appear in the instrument by adding to the declaration that these things were so done upon the ground of the lands, the words "*respectively and successively*." But when was it necessary to have more than one delivery? The rules upon this point are the following :—

1. WHERE LANDS
DISCONTIGUOUS.

(1.) The thing required being delivery of and upon the lands, it is manifest, that, whenever the grant conveyed two subjects lying separate from each other, delivery of one could not be delivery of the other, for the notary and others could not be present upon both at the same moment. A repetition of the ceremony, therefore, was requisite, whenever the lands were discontinuous, the same formality being gone through upon each successively.

2. WHERE LANDS
HELD OF DIFFE-
RENT SUPER-
IORS.

(2.) A separate act of infestment was also requisite, even when the whole lands lay contiguous, if different portions of them were held of different superiors.

3. WHERE LANDS
HELD BY DIFFE-
RENT TENURES.

(3.) Lands contiguous, though holding of the same superior, required separate infestments, if holden by different tenures.

4. WHEN SUB-
JECTS ACQUIRED
FROM DIFFER-
ENT VASSALS.

(4.) Lastly, separate acts of infestment were also requisite, though the subjects were conterminous, and holden of the same superior, and by the same tenure, when different portions of such subjects had been acquired from different vassals.

CLAUSE OF
UNION.

The sovereign power of dispensation was the cure for this inconvenience; and, accordingly, in obtaining or renewing Crown grants, a clause of union was inserted in the charter, by which it was ordained, that sasine taken ever after at the mansion-house, or upon any part of the lands, by delivering earth and stone only, without any other symbol, should be sufficient for the whole subjects disposed, although consisting of separate tenements of different denominations,

lying discontinuous, and requiring separate sasines and diverse symbols. The clause of union obviates only discontinuity, and the necessity of different symbols. It did not unite subjects derived from different authors, or held of different superiors, or of the same superior by different tenures, lands held under these circumstances being incapable of union. Contrary to the opinion of Craig, that, as the removal of one arrow loosens the whole bundle, so the effect of a clause of union was dissolved by the disposition of a part of the united lands, it was decided in *Montgomery v. Dalrymple*, 2d March 1813, that, when F. C. a part of the united lands is sold, the effect of the union continues with regard to the remainder, and that, although the clause of dispensation allows sasine only "*pro integris terris*," without specifying any portion thereof.

Union is implied in the higher right of barony, the creation of which both unites the lands, and makes one sasine suffice for distinct subjects, without special dispensation. Under the title, "MEMBER OF PARLIAMENT" in the dictionary, will be found authorities for holding, that, when by a clause of dispensation sasine is appointed to be taken at a particular place, the privilege is available to a disponee, although the appointed place be not conveyed to him; and that the quality of union may be communicated by a vassal to his sub-vassal. The benefit of dispensation does not require to be specially assigned, but passes as an inherent quality of the united lands; *Heron v. Syme*, 14th February 1771. In *Wood's Trustees, &c. v. Ferrier*, 6th July 1832, it was decided, that the privilege of a clause of dispensation extends to rights in security, as an heritable bond of annuity, and that the sasines completing such rights are sufficient if taken in accordance with the terms of the dispensation. This decision was affirmed, 25th March 1834.

The second part of the clause under consideration contains the specification of the hours between which the things certified by the instrument were done. The design of this was, the ceremony of giving infeftment being a public act, to show that it had not been done clandestinely, but in daylight. In the old case of *Arnot v. Turner*, 19th November 1679, a sasine, which, from the hour inserted in it, had confessedly been taken during the night, was sustained, there being no allegation of fraud, yet the universal practice has been, in accordance with the design of this part of the instrument, to take infeftment during daylight.

The body of the instrument of sasine concludes with the names and descriptions of the witnesses, who are said to be specially called and required. The latter words refer to the period, when, witnesses being unable to write, their presence was not proved by their signatures, and required, therefore, to be attested by the notaries. With

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UNION IMPLIED
IN BARONY.

MEMBER
Ersk. Inst. ii.
3, 46.

M. 8684.
10 S. 773.

7 Wil. & Sh.
App. 147.

SPECIFICATION
OF HOUR WHEN
SASINE GIVEN.

M. 14,852.

NAMES, &c., OF
THE WITNESSES
MUST BE SPECI-
FIED IN THE
INSTRUMENT.

PART III. regard to the number of witnesses, the Act 1584, cap. 4, which made
CHAPTER II. the attestation of one notary sufficient, required "a reasonable number" of witnesses, which expression, by subsequent decisions of the Court, was interpreted to mean two.

NOTARY'S DOCQUET.

The instrument is attested by the notary's docquet, an English law word which signifies a brief writing containing the substance of a greater writing; and the docquet of the sasine is in reality just a comprehensive assertion by the notary of his presence, and of the authenticity of the facts as set forth in the body of the instrument. It sets forth in Latin the notary's name and diocese, and his appointment by Royal authority and by the Lords of Council and Session—that he was present, while the things contained in the instrument were spoken, done, and transacted, and that he saw, knew, and heard, (*vidi, scivi, et audivi*,) that they were so done and spoken, and took a note of them, from which he has compiled the sasine, written by his own, or, as the case may be, by another's hand, or partly by both, upon so many pages of stamped vellum, (specifying marginal additions and erasures, if there are any,) giving it the form of a public instrument—and that he has marked and subscribed it with his ordinary mark, name, and surname, having been asked and required thus to testify to the faith, strength, and evidence of all and singular the premises. The notary's docquet must be holograph, although the body of the instrument may be written by another. The words, "*vidi, scivi, et audivi*," are indispensable; and, in *Primrose v. Davy*, 22d December 1612, a sasine was found null because it wanted them; and the omission of the statement of the notary's presence at the ceremony was also held fatal, although the words, "*vidi, scivi, et audivi*," were used; *Macintosh v. Inglis and Weir*, 17th November 1825. The Court here rejected the authority of the old decision, *Maxwell v. Nithsdale Tenants*, January 1680.

M. 14,326.

4 S. 190.

M. 16,887.

SUBSCRIPTION OF INSTRUMENT OF SASINE, AND NUMBERING OF PAGES.

By the Act 1681, cap. 5, it was enacted, that none but subscribing witnesses should be probative in instruments of sasine, and that they should be designed in the body of the instrument under pain of nullity; and, by 1686, cap. 17, it was permitted to write sasines bookwise, the notary's attestation condescending upon the number of leaves, and each leaf being signed by him and by the witnesses to the giving of the sasine. Notwithstanding the latter enactment, the Court afterwards pronounced a decision finding subscription on the last page sufficient, but this was reversed on appeal; *Duff v. Earl of Buchan*, 15th April 1725. In order to enforce the numbering of the pages of sasines, the Court of Session, by Act of Sederunt 17th January 1756, appointed the pages to be numbered, and that the notary should insert the number in his docquet, under the sanction of liability for damages to the party,

Robertson's App. 525.

and of deprivation of office. This Act of Sederunt was framed upon the assumption, that the statute 1696, cap. 15, required the numbering and specification of pages in instruments, as well as in deeds and securities.* But this was evidently erroneous, the application of that statute being by its terms necessarily limited to writings in which the witnesses attested the subscription, and signed on the last page only, whereas we have seen by the terms of the Act 1686, cap. 17, that, in this instrument, the witnesses attested the giving of sasine, and, therefore, are required to sign on every leaf. The Act 1686 has been so interpreted as to support a sasine, although not signed upon every page, but only upon the alternate pages—that is, upon every leaf. It was so found in *Carnegie v. Scott*, 26th February 1796, a second sasine, taken upon the assumption of the invalidity of the one thus signed, having been found inept, because that was no valid objection. In practice, the notary and witnesses subscribe every page, the notary's subscription upon the last page, with his motto prefixed, being written at the left side of the docquet, and the signatures of the witnesses immediately below. Both notary and witnesses verify also every marginal note with their signatures, and these are adopted by notice in the docquet.

Formerly this was the mode also of obviating vitiation by erasure, as will be found by reference to *Anderson v. Thomson or Anderson*, 31st January 1828; and the nullity of sasines containing erasures in essential parts, not thus remedied, is seen in *Hoggan or Smith v. Ranken*, 13th February 1835, affirmed 30th July 1840, where the erasure was in the year of the era, which was held fatal, though the year of the King's reign was entire; and, in *Howden v. Ferrier*, 10th July 1835, erasures in the names of two parcels of land were held to annul the instrument as to these, though not affecting its validity in regard to other lands, this distinction (which is important generally upon the subject of vitiation,) being made, that the words here erased were not (like the year) *in substantialibus* of the whole instrument, but only of so much of it as related to these particular lands. The severity of the penalty thus arising to parties from clerical inaccuracy gave occasion to the statute 6 & 7 Will. IV. c. 33, which, proceeding upon the narrative of the Act 1617 and subsequent statutes regulating the registration of sasines, and upon the occurrence of questions as to the validity of instruments of sasine and resignation *ad remanentiam* founded on erasures not appearing in the record, enacted, that no challenge of a sasine should hereafter receive effect on the ground of erasure, without proof of fraud, or that the record is not conformable to the instrument, as presented for registration. The Act does not extend to sasines or resignations

* See Act to abolish certain unnecessary forms in the framing of deeds, 19 & 20 Vict. c. 89, in APPENDIX. See also *supra*, pp. 97-99.

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See *supra*, p. 98.

M. 8858.

ERASURES IN
SASINES—EFFECT OF.
6 S. 463.

13 S. 461.

1 Rob. App.
173.

13 S. 1097.

6 & 7 Will. IV.
c. 33.

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propriis manibus, and it saves the validity of titles expedite before its date in order to remedy defects occasioned by erasures. The effect of this enactment is, that no erasure in a sasine, however essential in the part erased, is now of any consequence, unless made fraudulently, or after registration.

OBVIOUS BLUNDERS, &c. IN SASINES.

The Court will not interfere with an instrument of sasine on account of obvious blunders, inaccuracies, or ungrammatical expressions in the body or in the notary's docquet, provided it contain an effectual attestation that the essential things were done; and this may be assumed as a principle under the new form as well as the old. We shall not occupy time in citing numerous cases. The general character of such errors, which, although more honoured in the breach than the observance, are yet innocuous, may be gathered from the case of *M'Ghee v. Leishman*, 5th June 1827, where the objections were these:—(1.) That there was a want of precise conformity between the obligation, which was to infest in an annualrent, and the sasine actually said to be delivered, which was of lands in security of an annualrent—(2.) That the sasine was said to have been given to the attorney instead of to the granter himself—(3.) That the instrument bore, that the notary had called the witnesses, whereas he, being himself *rogatus et requisitus*, ought to take no active part, but to be a passive spectator, observing, in order to attest, the proceedings—(4.) That the docquet represented the instrument as written upon three pages, whereas it was written upon four. The Court being satisfied with regard to the first objection, that the sasine given was not truly unauthorized by the warrant; and that, notwithstanding the inaccuracies referred to in the other objections, the fact of delivery of possession in terms of the warrant was clearly made out, held the sasine to be valid. In various other cases, notwithstanding the requirements in the Act of Sederunt, errors stating the number of pages have been disregarded; as in *Morrison v. Ramsay*, 16th December 1826, where the notary asserted that the instrument was written on three pages, though it was all contained in one. In *Dickson v. Syme*, 24th February 1801, it was objected, that the notary stated the instrument to be written *manu alienâ*, although the names of the procurator, baillie, and witnesses, had been inserted by himself. The report does not shew how the objection was disposed of, but the marginal rubric bears that it was repelled. Other decisions in relation to such inaccuracies will be found referred to in the report of *M'Ghee's case*.

INSTRUMENT
MUST IDENTIFY
THE LANDS.

It is to be kept in view, as a general rule in force now as well as formerly, that the identity of the lands must be ascertained in the instrument. We have already had an example of a failure on this point in a case, where the party disposed "all my lands in the county of Ayr," and the instrument bore delivery of certain specific lands,

5 S. 758.

A. S. 17th Jan. 1756.

5 S. 150.

M. voce, "Tail-
zie," App.
No. 7.

Supra, p. 540.

but did not shew that sasines had been produced to prove that the lands so specified did belong to the granter. Another example to the same effect is the case of *Belshes v. Stewart*, 21st January 1805. Here the infestment proceeded upon a charter of lands, in a situation not explicitly described, which had been at any time incorporated with an earldom, and were not included in a certain entail, and upon a disposition of certain parts and portions of the earldom. It being assumed that the lands described in the disposition formed part of those conveyed by the charter, infestment was given of these particular lands, by virtue of the precept in the charter. But the Court held, that the sasine could not be sustained, no evidence having been produced to the notary, that the lands disposed were contained in the charter. The correct rule of practice is contained in the report of Lord MEADOWBANK's opinion in this case, which bears that "all *actus legitimi* ought to be formal and complete in themselves." It will be found instructive to compare the case of *Belshes* with that of *Hill v. Duke of Montrose*, 10th July 1833. Here lands having been united into a barony, infestment in particular lands as portions of the barony was held to be sufficient without production of evidence to the notary that the lands did form part of the barony, because the general name of a barony includes all its parts, and a warrant to infest in the barony or in any part of it is sufficient, without extraneous evidence, to authorize infestment in lands described as forming part of the barony, although it will be open to any one to reduce the infestment by proving that the description is false.

It has already been stated, that a general precept to infest in all the lands belonging to the granter is sufficient, and that sasine taken by virtue of such a warrant will be effectual in regard to all lands brought within its compass by production of the granter's infestments to the notary, so as to prove that the lands specified in the instrument belonged to him. This important doctrine is contained in *Graham's Creditors v. Hyslop*, 3d August 1753, which bears, that, "the Lords were all of opinion, that a precept to give infestment in lands described in general to belong to the granter of the precept is a sufficient warrant to give infestment in every particular tenement, which, by production of the granter's infestment, is vouched to come under the general description." The authority of two previous decisions reported by ELCHIES, viz., *Duke of Norfolk v. Billers*, 9th January 1739, and *Dalrymple v. Wallace*, 23d June 1742, was overturned by this opinion, which was referred to upon the Bench as authoritative in the case of *Hill*, just cited.

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F. C., & 2 Ross,
L. C. 32.

11 S. 958 ;
2 Ross, L. C. 84.

SASINE UNDER
GENERAL PRE-
CEPT TO INFEST
IN ALL GRANT-
ER'S LANDS.

M. 49 ; 2 Ross,
L. C. 31.

"Service and
Confirmation," No. 8 ;
2 Ross, L. C. 28.
"Sasine," No.
3 ; 2 Ross, L. C.
31.

Registration of Sasine.—The charter being granted, and the granter divested by delivery of possession to the grantee duly attested by

PART III.
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notarial instrument, the question arises—How is this transference to be rendered secure as regards third parties? In the transference of an obligation the assignee secures himself by intimation to the debtor, which compels the latter to recognise and deal with him as now the creditor. The transference of a corporeal moveable again is perfected by obtaining possession of it, possession being evidence to all the world that it belongs to the possessor. But, when the right is immoveable, neither of these expedients would avail. There is no debtor to receive personal intimation, whose possession is co-extensive with the subject. Intimation may be made to the tenant, and that to a certain extent is obligatory upon him, but it is a form affecting the temporary possessor only, and not the land itself, and so will be excluded by the establishment of a real right in another party. Again, with regard to possession, it is evident, that land from its extent, and from its character as immoveable, is incapable of such comprehension or attachment to the person, as to be capable of manifesting apparent ownership; and the idea of a title complete by possession is inconsistent with the notion of civil possession, *i. e.*, occupation not by the proprietor, but by another authorized by him. These difficulties have been obviated in Scotland, and a perfect expedient created for the completion of rights in immoveables, by the establishment of the register for publication. It in effect combines the modes of perfecting rights to which we have referred. As regards intimation, the register occupies the position of a universal debtor, if we may so speak, in regard to heritable rights, these rights being all as it were concentrated, and incapable of real transference without notice, there; and, with respect to possession, the register performs the function of a universal expositor of the real right of ownership, declaring more clearly by its pages, than the proprietor could do by standing constantly on the ground of the lands, that, whoever may be the actual occupant, the real right belongs to him. We have already explained generally the nature and arrangements of the registers, including those for publication. It is in regard to the latter chiefly, that our system of registration has acquired the reputation of great public utility. But there is nothing new under the sun. In Mr. Ross's Lectures there will be found a minute and interesting description of the system of registration (*insinuatio*) which was practised among the Romans, whose records were called *acta publica* and *gesta municipalia*. In addition to what is stated there, reference may be made to the formularies in the second book of Marculfus,—of which the 37th is the beginning of an instrument of registration. Like the instrument we have just examined, it begins with the date, and states the presence of the "*defensor civitatis*," or "*defensor plebis*," (an officer who took charge of the public records,) along with the magistrates of the town. The

ADVANTAGES
OF THE REGIS-
TER FOR PUBLI-
CATION.

ii. 67.

REGISTRATION,
AS PRACTISED
AMONG THE
ROMANS.

mandatory who has been appointed by the principal party addresses them in very courteous terms, craving that they will make the records (*codices publicos*) patent to him, for he holds in his hand something which he desires to secure by registration. The *defensor et curiales*—that is, the registrar and town-council—answer :—“The records are open to you, proceed, there is no occasion for delay.” Then the *vir magnificus*, the prosecutor or mandatory, relates that his venerable or illustrious constituent had enjoined him by a mandate to get a certain gift secured in the municipal register. The *defensor* says :—“Shew us your mandate, or recite it.” The mandatory, accordingly, recites the letter of mandate, which forms the first part of the 38th formulary, and entreats of his goodness to sue for registration of the deed in this town, and get it secured in the municipal records, engaging to ratify whatever he does. The 38th formulary then proceeds with the instrument, which bears, that, after the recitation of the mandate, the *defensor* desired him to recite the deed also—which he does—and then the *defensor*, and councillors, with great prolixity and formality, pronounce sentence, permitting insertion of the deed and its preservation in the public archives, and that extracts, signed and sealed by the registrar and councillors, should be delivered to the mandatory.

Our Statute-book exhibits various ineffectual attempts during the sixteenth century to secure the publicity of sasines by registration, in order that the King might know his vassals. But it was not until 1599, that an organized form of registration of deeds affecting land-rights was introduced. This was done by a Statute, not printed in the small edition, but contained in the fourth volume of the large edition. p. 184.

HISTORY OF REGISTRATION IN SCOTLAND.

This Act required registration within forty days after the date of the sasine under the pain of nullity ; and its provisions were renewed and extended by an Act in the year 1600. But it is unnecessary to de-ib. p. 237.

tail the provisions of these Statutes, the register instituted by them, and which was called the *Secretary's register*, having been abrogated by the Convention at Edinburgh upon the 27th January 1609, on account of the needless trouble, turmoil, fascherie, and expense it occasioned to His Majesty's good subjects. The foundation of our system of registration of land-rights was laid with a degree of success comparatively complete, by the Act 1617, cap. 16, which appointed a public register, in which instruments of sasine, as well as reversions and the other writs employed in creating, assigning, discharging, and renouncing redeemable rights affecting heritable property, should be registered within sixty days after their date. The keeper is appointed to engross the whole body of the writ in the register, and to deliver it back to the presenter marked by him with the day, month, and year of the registration, and also with the leaf of the register—that is, the number of the page. This statute contains various other pro-

PROVISIONS OF 1617, c. 16.

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1617, c. 16.

visions, to some of which we shall afterwards have occasion to refer. It appoints districts for particular registers. Under this Act, it is necessary that the sasine or other instrument either be recorded in the general register at Edinburgh, which applies to the whole kingdom, or in the particular register of the district within which the lands lie. If the lands lie in more than one district, and the registration does not take place in the general register, then it must be in the particular register of every district within which any part of the lands is situate. Although this statute expressly enjoined the keepers of the registers to engross the whole body of the writ within the register under pain of deprivation, it appears that there arose great laxity of practice in the observance of that regulation. This neglect it was attempted to cure by a singularly unhappy effort of legislation in the year 1686, by Act 1686, cap. 19, which enacted, that, when sasines and other writs were presented to the keepers, and delivered back bearing an attestation that they were registered, this should make them sufficient for the parties' security, although not inserted in the register. The fundamental error in this remedy consisted in its providing merely for the safety of individuals, while it overlooked the grand purpose for which the registers were instituted, viz., the security of the public by notice of the condition of the title to all property in land. This Act was, therefore, rescinded by 1696, cap. 18, which enacted that no sasine, or other writ or diligence appointed to be registered, shall be of any force or effect against the granters or their heirs, unless duly booked and inserted in the register. The statute ratifies a provision previously made, that parties injured by the omission or negligence of the keepers to insert writs attested as registered should have action of damage against the heirs and representatives of the keepers, although contrary to the usual rule of recourse.

1686, c. 19.

1696, c. 18.

A. S. 17th Jan.
1756.

The injunction in the Act 1617 was to engross the whole body of the writ, while the Act 1696 required it merely to be duly booked, and insert. As the transcription of the notary's docquet in the record was not thus specifically required, it became usual in practice for the keepers of the registers to leave out a considerable part of the notary's docquet; and the Act of Sederunt, 17th January 1756, to which we have already had occasion to refer, enacted, that the full sasine, and particularly the full docquet, should be engrossed with certification that the Lords would otherwise find the registration null, and subject the keeper in damages to the party, as well as deprivation of office.

1693, c. 13.

The practical efficiency of the system of registration was completed by two acts in the year 1693, the first of which, cap. 13, enacted, that sasines should in all competitions be preferable and preferred according to the date and priority of registration; and the due order of

precedence was secured by the immediately subsequent Act, cap. 14, which appointed minute-books to be kept, expressing the day and hour when, and the names and designations of the persons by whom, the writs are presented, and that the minute should be immediately signed by the presenter of the writ and by the keeper ; and the Act ordains registration to be made exactly conform to the order of the minute-book. These regulations are imposed upon the keeper under the pain of deprivation, besides damages to the party.

We shall now review in their order the different points requiring attention under these statutory provisions.

The first duty of the Conveyancer is to select a competent register. If the lands are in various counties, of which the particular registers are different, economy and convenience both point out the general register as the proper record, for otherwise the sasine must be recorded in the particular register of every district containing any part of the lands. Again, the register selected must be appropriate to the nature of the subject. The sasine of a *feudal* subject cannot be effectually registered in a burgh record, which is appropriated exclusively to writs connected with burgage tenements ; and this applies to lands of which the tenure is feudal, although they may be held of the magistrates of the burgh as feudal superiors, registration being regulated by a reference to the quality of the subject, whether it is burgage or feudal. The burgh records, therefore, are to contain only the subjects which are held of the Crown by burgage tenure, and not those which are held of the magistrates in the same way as of any other feudal superior for payment of a feu-duty. In *Davie v. Denny*, F. C. 2d June 1814, a feu-right was held ineffectually recorded in the burgh register ; and, although an opposite decision was given in *Dixon v. 2 S. 176. Lawther*, 1st February 1823, it is properly characterized by Mr. Bell in his Principles as “ not to be relied on ;” and the correct principle was resumed, sasines of subjects held feu being found inept, because recorded in the burgh register, in *Town Council of Brechin v. Arbuthnot*, 11th December 1840, and again in *Lord Fife's Trustees v. Magistrates of Aberdeen*, 25th May 1842.

By the Act 1617 the registration is to be within threescore days after the date of the sasine. These days are to be calculated by entire days, commencing after the expiration of that upon which the sasine is dated ; and a sasine recorded upon the sixtieth day by this mode of computation was found to be effectually registered, although, reckoning *de momento in momentum*, more than sixty days of twenty-four hours each had elapsed between the hour of taking the sasine and the hour of recording it ; *Lindsay v. Giles*, 27th February 1844.

In the process of recording, there are three things essential to be looked to :—

1. The entry in the minute-book.

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1693, c. 14.

THE PROPER
REGISTER MUST
BE SELECTED.

3 D. 216 ;
2 Ross, L. C.
111.
4 D. 1245.

REGISTRATION
WITHIN SIXTY
DAYS.

6 D. 77.

REQUISITES TO
BE OBSERVED IN
RECORDING
SASINE.

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2. The transcription of the instrument into the record.

3. The certificate of registration by the keeper.

We shall consider these in their order.

1. ENTRY IN THE
MINUTE-BOOK.

13 S. 505.

See *infra*, p.
563.

By 1693, cap. 13, sasines are preferable according to the date and priority of registration, and the minute-book was appointed to be kept, by 1693, cap. 14, for the purpose of securing this due order of precedence, by certifying in it the day and hour of presentation under the hand of the keeper and of the party presenting. The effect of these enactments was brought to the finest test in the case of *Douglas v. Dunlop & Co.*, 21st February 1835. Here there were two sasines entered in the minute-book as presented by the same person and upon the same day between the hours of eleven and twelve. They both affected the same lands, and a competition having arisen, the preference was given, in strict conformity with the priority of registration mentioned in the statute, to that which appeared first in the minute-book. A sasine is thus to be held as recorded from the moment when it is entered in the minute-book; *Maclaine v. Maclaine*, 16th June 1852, affirmed 6th July 1855; and it concerns the security of the registration, that the minute of presentation should be carefully and distinctly made and completed with the signatures of the keeper and presenter.

14 D. 870.

2. TRANSCRIPTION OF INSTRUMENT INTO
RECORD.

It is essential to the purpose of registration, which is to furnish accurate information to the lieges, that the whole instrument be engrossed in the record with perfect accuracy, otherwise it cannot afford security. Any essential error in the transcription, therefore, will be fatal to the validity of the instrument. Accordingly, in *Macqueen v. Nairne*, 23d January 1823, the omission in the record of the word *primo* of the year was held fatal; and the same result followed in *Grey v. Hope*, 23d February 1790, from the omission in the record of certain lands in the clause of delivery of sasine. Here the keeper of the record was fined upon a complaint, and held liable in damages. The case of *Stewart v. Earl of Fife*, 20th February 1827, is another example of the omission in the record of part of the lands proving fatal to the sasine in regard to these lands.

2 S. 637.

M. 8796.

5 S. 383.

It was natural for practitioners to endeavour to obtain a remedy for a miscarriage so grievous as the nullity of a sasine by errors in the transcription; and, in the case of *Innes*, 20th December 1806, the Court upon the party's petition, authorized correction of the record by a marking, to receive effect from its date. But, in a similar application afterwards, *Dundas v. Dennistoun*, 15th December 1824, the Judges were unanimous in holding, that the record could not be altered after expiration of the sixty days. More recently, in *Duke of Montrose*, 17th June 1846, the subscriptions of the notary and witnesses having been omitted in the record, warrant was granted to supply the defect by a marking on the margin. But the report of this case is not sufficiently detailed to afford any indication, whether

F. C.

3 S. 400.

8 D. 822.

it can be held to imply a general relaxation of the rule laid down in the case of *Dundas*. PART III.

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3. CERTIFICATE OF REGISTRATION.

The keeper's certificate of the registration was always an important part of the procedure, and we shall presently see that its importance has been enhanced by the recent statute affecting sasines. This certificate is required by statute, and vitiation in it ought to be carefully avoided. In the case of *Adam v. Duthie*, 19th June 1810, a sasine was sustained, although the date of recording as entered in the record was vitiated, the minute-book and certificate being both entire; but the keeper of the record was required to attend at the bar of the Court to answer for the irregularity; and, in *Drummond v. Ramsay*, 24th June 1809, a sasine having been recorded upon the 25th September, but omitted to be entered in the minute-book till the 4th October, the date of recording was erased both in the register and in the attestation, in order to agree with the minute-book. This was held to infer a total nullity. This decision rested, however, upon the multiplication of irregularities, and upon the peculiar requirements of the election Statutes in regard to the due registration of sasines claimed upon. In the case of *Gibson-Craig v. Cochran*, 10th July 1838, a gross error in the date of the attestation (1782 instead of 1802, and the first four letters of "December" being upon an erasure) is said to have been held immaterial. It was pleaded here, that the Statute 1693, cap. 14, appointing the minute-book, with the subsequent Act of 1696 rescinding the Act which made the certificate effectual independently of the entry in the register, had made the minute-book and the register the only essentials in registration, and that, when these were correct, an error in the certificate was immaterial. The report of this case does not shew explicitly whether the point in question materially affected the judgment. At all events, we shall presently see that, under the recent Statute, the keeper's attestation is an essential requisite. In the case, already cited, of *MacLaine v. MacLaine*, 16th June 1852, affirmed on appeal, it was again held, as in the case of *Douglas*, that the date of ingiving entered in the minute-book is the date of recording. An objection taken here, therefore, that a sasine had not been registered until more than sixty days after its date was repelled, the date in the minute-book being within sixty days, and the entry of a wrong date in the register manifestly a clerical error. In the same case, corrections upon the margin of the register were not held to form objections, the challenge not being made until between sixty and seventy years after the registration, while the corrections were in the same hand as the body of the register, and the register itself was exempt from suspicion as being *in publicâ custodiâ*. If the keeper of the register die without attesting the sasine, the Court will, upon an application for the purpose, authorize his successor to do so; *Young*, 20th December 1799. F. C.

16 S. 1832.

14 D. 870;
supra, p. 562.

M. 13,575.

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LOST SASINE,
HOW SUPPLIED.

We had occasion formerly to observe, that, when an instrument is registered for publication, it is not retained in the register, as is the case when the object is preservation. The principal sasine with the attestation is delivered back to the party ; and, if it shall be challenged as false, that challenge can only be met by producing the principal instrument, because he is bound to have it in his possession. This is expressly enacted by the Statute 1617, which allows an extract of the register to make faith in all cases, except where the writ is offered to be improven. What then is the remedy in the event of a principal sasine being lost ? Formerly, it might be renewed by the notary from his protocol, if the witnesses were still alive to attest it ; and the new instrument was as effectual as that which was lost, for both contained the same facts, attested by the same notary and witnesses ; and the notary might be compelled to give the party the benefit of this remedy by an action, directed against him and the witnesses and all others concerned, proceeding upon a summons of extension. It was also held the duty of the Keeper of the Register to mark the new instrument as registered of the same date as the lost one ; *Ramsay*, 2d January 1678 ; but, in the subsequent case of *Cochran*, 4th July 1699, the Court refused to enforce the attestation of a second sasine, on account of the imperfection of the notary's protocol ; and, as protocols have now gone entirely into disuse, the only remedy left is to prove the tenor of a lost instrument. It has been suggested, however, and the suggestion is well worthy of consideration, that this contingency may be provided against in some measure by expeding two instruments of the same sasine in cases of great importance.

Ross, ii. 208.

M. 13,553.

M. 13,561.

EFFECT OF AN
UNRECORDED
SASINE.

We have now to consider the legal effect of a sasine, taken but not recorded. The Act 1617 decerned an unrecorded sasine to make no faith in judgment in prejudice of a third party who had acquired a perfect right to the lands, but allowed it to be used against the granter of the warrant and his heirs and successors. The doctrine entertained with regard to these provisions at a former period was, that, although an unrecorded sasine was ineffectual against third parties who had acquired a good right to the lands, yet that it formed a real right available against the granter of the deed upon which it proceeded, and his heirs and creditors. This was the view taken by Institutional Writers ; and, in *Rowan v. Colvil*, 21st July 1638, it was found irrelevant for one liable in multures to plead non-registration of the claimant's sasine, that objection being competent only to one producing a better title to the property. Tenants also were found to be excluded from pleading this objection ; *Gray v. Tenants*, 24th March 1626 ; and an example of the effect of the statute in excluding the granter's heir from expeding a preferable title will be found in *Simson v. Blackie*, 28th June 1678.

M. 13,546.

M. 13,540.

M. 13,553.

The light in which these decisions were viewed was, that they were founded on a real right created by the unrecorded infeftment, although not pleadable against parties holding a better right. But, in the case of *Kibble v. Stewart*, 16th June 1814, Lord MEADOWBANK held the true view to be, that an unregistered sasine is absolutely null and void, although some persons are not entitled to plead the nullity. The importance of this view arose from the insecurity held to result from the other opinion, for, if a real right did result from the unrecorded sasine, then the warrant upon which it proceeded has been used, and, as an exhausted warrant is no longer effectual, the grantee was precluded from making his right secure against third parties by taking and recording another sasine. This question, accordingly, arose in the case of *Kibbles v. Stevenson*, 18th December 1830, and, the opinions of the whole Court having been taken, it was decided that a precept is not exhausted by an unrecorded sasine, and a second sasine upon the same precept was held to be competent. This decision was affirmed 23d September 1831. The same view had previously been taken by the Second Division of the Court, which, in the case of *Moncrieff*, 29th January 1830, gave its sanction to a second infeftment taken under a special statute, an inaccuracy having been found in the first by the omission of a word. The vital importance of this doctrine came out in a light peculiarly strong in the case of *Young v. Leith*, 16th January 1844. Here, a party possessing upon an unrecorded sasine, executed a disposition altering the destination of lands; and, if an unrecorded sasine formed a valid title *inter hæredes*, then this disposition would have been effectual; but the Court held unanimously in the First Division, that the not recording was an absolute nullity, and that the disposition was ineffectual as flowing from a party not invested. The Court here proceeded upon the precedent of the decision in the case of *Town Council of Brechin v. Arbuthnot*, 11th December 1840, already referred to, which was virtually to the same effect, the defender there having been found entitled to use an old precept, although it had been used by his ancestor, because the ancestor's sasine, being entered in a wrong register, and, therefore, held to be unrecorded, had not exhausted the precept. The case of *Young* having been appealed, it was remitted to the Court of Session to be argued before all the Judges, and to have their opinions reported. The result, *Young v. Leith*, 11th March 1847, was, in the opinion of the majority, that an unrecorded sasine is absolutely null. The whole of this important subject is fully discussed here in very elaborate opinions.

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F. C.; 2 Ross,
L. C. 109.

9 S. 233;
2 Ross, L. C.
109.

5 Wll. & Sh.
App. 553.

8 S. 416.

6 D. 370;
2 Ross, L. C.
81.

3 D. 216.

9 D. 932.

2. *Sasine under the new form*.—Having now examined the material things in the old instrument of sasine, it remains to point out the

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**DESIGN OF
STATUTE 8 & 9
Vict. c. 35.**

**TERMS OF THE
STATUTE.**

**CLAUSES OF
NEW INSTRU-
MENT OF SASINE.**

alterations introduced by the recent Statute, and to notice briefly the principles and rules, fixed by the previous practices and decisions, which may be considered as remaining authoritative in the case of the new instrument also. The rules and authorities hitherto noticed are those to be employed in testing the accuracy of instruments of sasine, whose date is not later than the 1st October 1845, being the time fixed by the 8 & 9 Vict. cap. 35, for the introduction of the new forms, which it does not imperatively prescribe, but allows, and which from their greater convenience and economy will necessarily supersede almost entirely those previously employed. The design of the Statute was, while the instrument of sasine was retained, to strip both it and the ceremony of everything not conducive to that upon which its efficacy has always virtually depended, viz, the registration of it. Accordingly, the enactment is, that after the day we have mentioned, it shall not be necessary to go to the lands, or perform any act there, and that sasine shall be effectually given, and infestment obtained, by producing the warrant to a notary-public, and by expeding and recording in the general or particular register an instrument, setting forth that sasine had been given, and subscribed by the notary and witnesses according to the form subjoined to the Act. This is declared to be effectual, whether the precept shall be in the old form or in the abbreviated form which we have already noticed as appended to the Act. The 2d section provides for the recording of the new instrument in the manner previously observed, and that, when recorded, it shall have the same effect as a recorded instrument of sasine according to the previous practice. The 3d section is very important, since it abolishes the present limitation of sixty days, and makes registration competent at any time during the party's life, with this provision that the date of presentment and entry, marked by the keeper of the record upon the instrument, shall be its date. The 5th section permits the abbreviated forms of the precept and instrument, and declares these as valid as those previously in use.

Let us now examine the form of the new instrument as contained in the schedule. It may be divided into five clauses :—

- (1.) The production of the warrant to the notary.
- (2.) The narrative of the warrant, including the description of the lands.
- (3.) The insertion of the precept.
- (4.) The giving of sasine.
- (5.) The testing clause.

We shall briefly comment upon these in their order :—

- (1.) *Production of warrant to the notary.*—First must be specified the place where the instrument is presented, and that will be the place where it is signed. The schedule bears presentment by, or on behalf of, the party to whom sasine is to be given. These words,

"by, or on behalf of," are, no doubt, alternative. If the party himself presents the warrant, the Conveyancer will say "by," and, if it is presented by another, then it will be "on behalf of." It will be observed that this form of the instrument preserves no evidence to show who required sasine to be given, and, by the same principle which formerly entitled the party to show that the attorney named acted without authority, it will still be competent to one injured by the passing of infeftment in his favour to prove that he did not authorize it. It will be prudent, therefore, when the circumstances are such as may give rise to a question of this nature, for the notary to preserve evidence which will exonerate himself, by showing upon whose application he gave the sasine. The deed containing the warrant is to be described here only by its name, and by the name and designation of the granter, referring to the precept of sasine after inserted for its date, and here also there must be described any connecting deed or writ or extract. These must be identified by their dates. It must be remembered that in the case of *Hamilton v. Lord Hamilton*, 24th 2 S. 640. January 1824, the omission of the year in the date of a disposition would have proved fatal, but that it was held to be infallibly supplied by the year of the sasine itself, which was the only one mentioned in the instrument.

(2.) *Narrative of warrant*.—Here is narrated the dispositive clause, with the name of the disponent—the destination that the grant is made heritably and irredeemably, or of a limited character, and there is inserted a description of the lands. Of course it is of vital importance to insure the strictest accuracy. Next there is

(3.) *The insertion of the precept of sasine*.—This has in this way become matter of statutory requirement; and here also perfect accuracy must be observed. By the terms of the first schedule, the testing clause of the deed has become a portion of the precept. It must, therefore, be inserted, and the former practice of copying *literatim* the signatures also both of the party and of the witnesses, will be continued.

(4.) *The delivery of sasine*.—There is here no ceremony prescribed: the words are, "*In virtue of which precept, I hereby give sasine;*" and the act of delivery consists in the notary's subscription of the instrument, followed by registration. If the sasine is intended to be of a qualified nature, it must be so expressed, (as directed in the schedule;) and it is to be carefully observed, that, while the instrument cannot effectually confer a higher or more extensive right than is contained in the warrant, the extent of the right may, on the other hand, be restricted by the instrument, so as to be less comprehensive than the precept might authorize. Of this there is an example in *Graham's Children v. Graham*, 4th July 1759, where an instrument bearing M. 6931. delivery of liferent state and sasine was held only to vest the liferent in the party, although the disposition contained warrant for infefting him in the fee.

PART III.
CHAPTER II.
CLAUSES OF
NEW INSTRUMENT OF SASINE,
CONT'D.

SASINE IN
QUALIFIED
TERMS.

PART III.

CHAPTER II.

ABOLITION OF
SYMBOLS.
Historical Law
Tracts, p. 100.

STATUTORY
UNION.

The new Statute has silently abolished the use of symbols, thus fulfilling the prophecy of Lord KAMES:—"When our notions come to be more refined, and substance regarded more than form, it is probable that external symbols, which have long been laid aside in personal rights, will also be laid aside in rights affecting land." The risk of error in the symbol is now, therefore, avoided. Neither is there any provision for the observance or attestation of more than one act of infeftment in the same instrument, because the enactment contains what is equivalent to a clause of union in the declaration of the first clause, that the new mode of infeftment shall be effectual, whether the lands lie contiguous or discontinuous, or are held by the same or by different titles, or of one or more superiors. This provision would have been more complete, if it had specified different *tenures*, as well as titles. Lands held by different *tenures* are incapable of union; and a question may arise, whether one sasine would, under this Act, suffice for separate parcels of land held by different *tenures*, as well as for lands of the same *tenure* held by different titles.

Supra, p. 555.

SASINE GIVEN
UNDER BUR-
DENS.

This part of the new instrument, viz., the giving of sasine, is its vital part, without which it would specify nothing, and fall by the same rule which gives no effect to old sasines where the act of delivery is omitted in the body, or the words "*vidi, scivi, et audiui*" in the docquet. The vitiatory effect of erasures would be avoided by the Act of 1836, but any omission would, no doubt, be fatal.

If the sasine is given under the qualification of any burden, it is to be referred to "*as before specified*;" and we thus learn that the proper place to insert burdens upon grants is in the dispositive clause, and that they are to be regarded as part of the description, the description being the only previous part of the sasine, where the burden can be specified in conformity with the schedule. Lastly, we have

TESTING
CLAUSE BEARS
NO DATE.

(5.) *The testing clause*.—It contains no date, and thus declares emphatically the immateriality of any date but that of registration. The way in which the schedule is printed does not indicate that the number of pages is to be inserted; but as the reference to preceding pages must necessarily be omitted when there is but one page, so it is not incompetent to insert the number of pages, and this ought to be done.

FUNCTION OF
WITNESSES
UNDER NEW
FORM.

A material change has taken place in the function of the witnesses. Formerly they were witnesses, in terms of the Act 1686, to the giving of sasine, and so they were required to subscribe every leaf. Now, by the terms of the testing clause in the schedule, they are witnesses only to the subscription of the notary. It is true, that, as we have already remarked, his signature comprises the act of giving infeftment, and it might be contended that they are in that view still witnesses to the giving of sasine. General practice, which is under-

stood, however, not to be uniform, has adopted the view, that the witnesses attest only the subscription, and that their subscription, therefore, is not necessary upon any but the last page. It would have been desirable that this point had been clearly settled by the Act.

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Registration of new instrument.—The provisions of the statute for the recording of sasines are very important. The instrument may be recorded at any time during the life of the party in whose favour it has been expedite. This privilege appears to apply only to instruments in the form here prescribed. It is to "*every such instrument of sasine.*" If in any case, therefore, a sasine should be taken in the old form, it would still be necessary to have it registered within sixty days. The character of the registration, as truly the essential act of infestment, is strongly marked by the provision, that it can only be recorded during the life of the party. Formerly, registration after the party's death was competent and effectual, if within sixty days of the date of the sasine. Here, then, along with a great apparent extension, we have in this respect an important contingent restriction of the time of registration; and, as the unlooked-for death of the party may preclude the possibility of completing the infestment by registration, ordinary prudence strongly urges it as a rule, that in every instance it should be recorded instantly after subscription.

REGISTRATION
COMPETENT
DURING PARTY'S
LIFE.

The declaration of the third section, that the date of presentment and entry set forth on the instrument by the keeper of the record shall be taken to be its date, is deserving of very serious consideration. Under the principles pleaded and apparently sustained in the case of *Gibson-Craig*, the date and fact of registration were held to depend upon the entry in the minute-book, as containing the joint-declaration of the keeper and the party presenting it; and gross error in the attestation of the keeper, was, therefore, disregarded. This enactment, however, gives to the certificate a much more important place than formerly; and errors in it could not now be held to be immaterial, since it has the statutory effect of fixing the date of the instrument. Doubtful questions might thus arise in the event of a discrepancy between the minute-book and the attestation; and an important question also would be, whether the attestation forms a part of the sasine, so as to give it the protection of the Act regarding erasures. These considerations enforce very strongly the duty of the practitioner in seeing that the attestation corresponds with the minute-book and record, and is in itself regular and entire.

DATE OF IN-
STRUMENT.

Supra, p. 563.

EFFECT OF
KEEPER'S CER-
TIFICATE.

In reviewing the enactments of the new Act, it is to be remarked generally, that it does not in terms rescind any of the previous Statutes regarding sasines. It operates by permitting and making lawful new forms and instruments to produce the same effect as those prescribed by the older Statutes, and which might yet be effectually practised since

OLD ACTS NOT
RESCINDED BY
8 & 9 VICT. c.
35.

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CHAPTER II.

they are not expressly abolished, though virtually superseded by the convenience and cheapness of the new forms. There being thus no rescissory terms, the previous statutory rules still subsist in so far as new observances have not been allowed in the room of some of them. As regards registration, therefore, we must still select the competent register, and have the instrument entered in the minute-book by a joint declaration specifying the day and hour of presentment. It must still be engrossed in its due order in the record, and any material error there will still produce effects as fatal as formerly. The principal sasine must still be produced, when challenged as fraudulent; and, with regard to a sasine not recorded during the party's life, it will be subject to the same objections as one formerly omitted to be registered within sixty days of its date.

EXPEDING NEW
INSTRUMENT
WHERE FORMER
ONE DEFECTIVE.

This Statute has now directly sanctioned what was formerly observed in practice, viz., that, in case of error or defect in an instrument of sasine or in recording it, a new instrument may be made and recorded, and have full effect from the date of recording, as if there had been none previous. Of course, in availing ourselves of this remedy, it will be prudent to ascertain that the error is of sufficient magnitude to justify the expediting of a second sasine; and, if it should be of a doubtful nature, care must be taken not to rest the title exclusively upon the second sasine, lest, as in the case of *Carnegie*, the first one should be found to be valid, and the second, therefore, inept.

Supra, p. 555.

In conclusion, we have only to advert to what was formerly said on the subject of stamp-duties, and to refer again to the case of *Mackintosh v. Grant*, 12th May 1831, which shews the necessity of having a separate stamp or series of stamps for each warrant, when the infestment given by virtue of them is contained in the same instrument.

9 S. 583.

SASINE *propriis*
manibus STILL
COMPETENT.

Sasine PROPRIIS MANIBUS.—We have a remnant of the proper investiture (i.e., of sasine bestowed by the superior's personal act upon the ground) in the sasine *propriis manibus*. By the former practice this might take place either where there was a separate antecedent warrant, or without it. When there was a previous warrant, the instrument differed from that ordinarily used in bearing the appearance of the superior himself, instead of his baillie; and, when this mode of infestment was contemplated, it was unnecessary to insert a precept in the charter, there being no need of a warrant to the superior's baillie to do what he was to do himself. If the charter, however, did contain a warrant, then it was unnecessary to insert it in the instrument. In so far as concerns sasines *propriis manibus*, where there is an antecedent warrant, these may be regarded as practically superseded by the recent statute.

But this modification of the instrument has been chiefly used for

the purpose of constituting or securing provisions by husbands to their wives, or parents to their children ; and, in such cases, there is no reason to suppose that they will not still be practised. It has indeed been said, that sasines *propriis manibus* appear now to be incompetent. But that observation overlooks the nature of the Infeftment Act, which, though it introduces a new form, does not abolish the old. That Statute, however, expressly refers only to sasines proceeding upon prior written warrants ; and when sasine, therefore, is to be given *propriis manibus*, it must be done according to the old form.

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Alexander's
Analysis, p. 21.

But it is to be kept in view, that, when there is no separate warrant, a mere notarial instrument cannot operate a transfer of property. Such an instrument is the assertion only of the notary ; and the granter of the infeftment cannot be divested without his own written act. Accordingly, various cases will be found noted in the Dictionary, in which sasines *propriis manibus* were rejected, because proceeding upon no written warrant of the granter. The last of these cases is *King v. Chalmers*, 15th November 1682. This report also shews, how the want of a separate antecedent warrant may be supplied, viz, by the subscription of the granter upon the sasine itself. This subscription, though operating as an alienation, is effectual, though not attested in accordance with the statutory solemnities ; *Kibble v. Ross*, 4th December 1804. In the subsequent case of *Anderson*, however, to which we shall presently refer, the objection that the signature was unattested was regarded by Lord NEWTON as entitled to some weight, and it would be prudent, therefore, to obviate question by inserting in the body of the instrument an attestation that the granter subscribed it according to the solemnities.

NECESSITY OF
GRANTER'S SUB-
SCRIPTION TO
SASINE *prop.*
man.

M. 12,508;
12,524.
M. 12,523.

M. 14,314.

The distinguishing feature of the instrument in this form is the clause of delivery, which bears, that the granter, "*ex propriis suis manibus, gave and delivered*" liferent (or heritable) state and sasine, &c. These words, however, or English words of the same import, are not essential, and the sasine will be sustained, provided it bear the presence of the granter, and delivery by him ; *Anderson v. Thomson* or *Anderson*, 31st January 1828. When the sasine is granted in satisfaction of a previous obligation, the marriage contract or other deed containing such obligation should be narrated ; but the decision last cited shews, that a provision to a wife may be effectually secured in this way by a solvent granter for a reasonable amount, although there be no previous obligation.

CLAUSE OF DE-
LIVERY IN SA-
SINES *prop.*
man.

6 S. 463.

It is to be carefully observed, that sasines *propriis manibus* are not protected by the Act 6 & 7 Will. IV. cap. 33, which exempts sasines from challenge on the ground of erasure. On the contrary, they are expressly excepted from that Statute, and justly so, inas-

SASINES *prop.*
man. NOT PRO-
TECTED BY 6 &
7 Will. IV. c.
33.

PART III. an attestation of the delivery of possession, but is by its nature an act of alienation, and embraces in itself the warrant as well as the delivery.
CHAPTER II.

III. EFFECT OF THE FEUDAL INVESTITURE, AND OF CONDITIONS INSERTED IN IT.

The charter and sasine, which we have now examined, constitute the feudal investiture, and establish the relation of superior and vassal. The rights resulting to the respective parties from that relation we have already examined, when we found that the *dominium directum* or *dominium eminens* embraces the feudal duties rendered by personal service or payment of grain or money, with casualties or incidental payments arising upon certain contingencies; while the *dominium utile* consists in the absolute property and profitable use of the feu, subject to these reserved rights of the superior.

**SUPERIOR NOT
ABSOLUTELY
DIVESTED BY
GRANTING FEU-
RIGHT.**

From the principles already traced, it results, that by granting a charter and sasine the superior is not divested, although a dependent estate is thereby created. His right continues, in so far as it is not given up by the grant of the *dominium utile*. If the grantor of the feu is himself a vassal, then he remains the vassal of his own superior, and upon his death his heir will be entered precisely in the same manner, and with the same description of the lands, as if no subordinate feu had been granted. The superior, therefore, after granting the feu, can exercise all acts of proprietorship against every party, except the vassal or those deriving right from him. Of this there is an illustration in *Laird of Lagg v. his Tenants*, 19th November 1624, where the superior was found entitled to remove tenants who could not shew that their possession was derived from a vassal. In a recent case the superior has been found entitled to challenge encroachments and operations of third parties injurious to the feu, whether the vassal interferes or not; *Marquis of Breadalbane v. Campbell*, 12th February 1851. And the continued subsistence of the superior's right is strikingly shewn by this, that his title may eventually become again the title of the *dominium utile*—as, in the case of his acquiring right to the feu, but possessing afterwards upon the nobler title. The inferior title will in these circumstances, as we shall afterwards see, be worked off by the negative prescription, and the property being thus absorbed in the superiority, the superior's title will again comprehend the *dominium utile*. In order to ascertain what rights have been granted by himself or his predecessors affecting the superiority, the superior is entitled to call for production of such rights. This was done formerly by an action of shewing the holding; now it is accomplished by reduction improbatum. The superior may also sell the

**SUPERIOR MAY
REMOVE TEN-
ANTS.
M. 13,787.**

13 D. 647.

**SUPERIOR'S
TITLE MAY
AGAIN BECOME
TITLE OF PRO-
PERTY.**

**SUPERIOR MAY
SELL SUPERIO-
RITY.**

dominium directum ; but, as will be explained in treating of the disposition of superiority, his power of selling is subject to certain limitations, necessary to protect the vassal's right.

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CHAPTER II.

On the other hand, by the charter and sasine the vassal obtains the real property of the grant, embracing all that is expressed in it, or which the law determines to be his, and in particular embracing all that is above and all that is below ground, *a cælo usque ad centrum*, or, as it is strongly expressed in the formulary of Brissonius, to which we have already had occasion to refer, "*ab infimo solo ad usque cæli subsellium cum ipso etiam cælo cumque terræ imis atque perimis infernisque.*" His right being real, it excludes all incomplete personal diligence, as we have already seen in *Webster v. Donaldson*, M. 2902. 13th July 1780, where a sasine was preferred to a prior arrestment. The vassal possesses the right of disposal, which is inherent in the nature of property, and he may sell the feu in whole or in separate portions, as he thinks fit.

VASSAL'S RIGHT
EXTENDS *a cælo*
usque ad cen-
trum.

But, although the charter is by its form a unilateral deed, it has the effect of a mutual contract, and, by acceptance of it with the clause, "*reddendo inde annuatim*," the vassal becomes personally liable for the feu-duties, and he remains so even after he has sold the lands, until the purchaser is relieved by the superior ; *Wallace v. Ferguson*, 29th June 1739.* It was once supposed, that the vassal might liberate himself by renouncing, or, as it is called in feudal language, *refuting* the feu ; and this was attempted in *Hunter v. Boog*, 16th December 1834. But the Court held, that the feudal doctrine of refutation applied only to proper *beneficia*, and not to feu-holdings, where there is a mutual onerous consideration—that the vassal, therefore, could not renounce—and that the superior was entitled to decree of perpetual liability against him.

VASSAL PER-
SONALLY LIABLE
FOR FEU-DUTIES
TILL ANOTHER
RECEIVED.

M. 4195.
13 S. 205 ;
2 Ross, L. C.
231.

While the consequences of the feudal relation are such as we have described, when the grant is made in the general terms which we have reviewed, it is not indispensable to that relation, that the rights resulting from it should in every case be inflexibly the same. The superior may reserve to himself rights affecting the *dominium utile*. The description determines the extent of the feu, and whatever is beyond the limits described continues with the superior, because it is not conveyed. But he may also retain to himself by exception or reservation portions of the subject conveyed, which, without such reservation, would pass to the vassal. Thus, he may reserve to himself (and this is frequent in practice) the mines and minerals contained in the lands ; and, as these are excepted both from the transmission, and from the warrant to infest the vassal, they will continue vested in the superior by virtue of his own title. In this, which is the most important reservation affecting the substance of the grant, it is neces-

RESERVATIONS
BY SUPERIOR.

RESERVATION
OF MINES AND
MINERALS.

* See *supra*, note, p. 531.

- PART III.
CHAPTER II.
- F. C.
1 Sh. App. 225.
3 D. 1121.
- M. 6573.
- 5 S. 307.
- CONDITIONS IN
FAVOUR OF
SUPERIOR.
- RESERVED BUR-
DEN OF SUM OF
MONEY.
- IMPOSITION OF
SERVITUDE
RIGHT.
- CLAUSE OF PRE-
EMPTION.
- 11 D. 122.
- sary to define with precision, whether the reservation is to extend beyond coal, metals, and the other more valuable minerals. A reservation of the "hail mines and minerals of whatever nature and quality," was held not to comprehend a quarry of stone of a rare quality, and peculiarly fitted for architecture; *Menzies v. Earl of Breadalbane*, 10th June 1818; affirmed 17th July 1828. The same doctrine received effect in *Duke of Hamilton v. Bentley*, 29th June 1841. If freestone, therefore, or any other mineral substance of the less valuable kinds, is to be reserved, it must be specified. When this reservation is made, it is not necessary, in order to prevent injury to the vassal by the use of it, to stipulate for payment to him and his tenants of damages occasioned to the surface by digging, transportation, &c., such damages being due without stipulation. In *Duke of Argyle v. Feuars of Sheardale*, 21st November 1788, there being no stipulation to that effect, the superior was found not entitled to work reserved minerals without liability for surface damages. A right to work and transport minerals, however, and to do everything necessary thereanent, on paying surface damages, gives no right to take from the lands materials to make roads for transporting what is worked; *Harrowar's Trustees v. Erskine*, 6th February 1827. Therefore, power to take stones, and other materials not falling within the principal reservation, must be specially reserved, in order to give the right.*
- Besides reservations affecting the substance of the property, the superior may insert any lawful conditions, calculated to secure to himself rights and privileges connected with the grant. These may be of various kinds suited to different objects—*e.g.*, the grant may be burdened with a sum of money payable to the granter. This reservation we shall examine in treating of heritable securities, when it will appear, that a burden of this kind must be specific in stating the amount, and that, in order to form a real lien, and to affect singular successors, it must be expressly attached to the property, otherwise it will form a personal claim only.
- Another species of conditions consists in the imposition of servitudes, as *altius non tollendi*, and *luminibus non officiendi*. They must also be made real, in order to be available against third parties.
- Besides those now mentioned there are other conditions, which, as more intimately connected with the peculiar principles of the feudal tenure, fall properly to be examined here. Of these there are two, which are frequent in practice, and have been much discussed.
- The first is the clause of *pre-emption*, which is a stipulation, that the vassal shall not be at liberty to sell without first having made an offer to the superior at the price proposed by another. This condition
- * A clause in a feu-contract, reserving to the superior liberty to search and dig for stone quarries and for coal in the lands feued, and to win coals and stones therein was held not to comprehend a reservation of black-band ironstone, in *Forth & Clyde Navigation Company v. Wilson & Co.*, 21st November 1848.

has been objected to as struck at by the 10th section of 20 Geo. II. cap. 50, which, with reference to clauses *de non alienando sine consensu superiorum*, discharges all such prohibitory clauses restraining the power of alienation. But it has never been decided, that this enactment precludes the clause of pre-emption. On the contrary, that plea was repelled in *Irving, &c. v. Marquis of Annandale*, 6th March 1767; and, although a different view was taken in *Farquharson v. Keay*, 2d December 1800, the previous rule was resumed in *Preston v. Earl of Dundonald's Creditors*, 6th March 1805, where a separate obligation to make the first offer to the superior was held obligatory, while the grantee's right continued personal. A condition, however, which, like this, is unfavourable to liberty, is strictly interpreted, and will not affect alienations, made without the superior's consent, which do not fall precisely within its terms. So in *Earl of Mar v. Ramsay*, 28th November 1838, a vassal with a clause of pre-emption sold by auction with the superior's consent. The purchaser, without being infeft, and consequently not entered with the superior, sold to another party at a higher price, having made no offer to the superior. It was held, that the prohibition, being by its terms directed against the vassal, the purchaser who had never become vassal was not bound by it. If, therefore, parties holding by a personal title are to be subjected to the restraint, its terms must be such as to embrace them. In considering this case, it was treated as a doubtful question by Lords MACKENZIE and COREHOUSE, whether the clause of pre-emption strikes against every successive vassal throughout all time; for it was pleaded, that it affected only the grantee and his heirs and assignees, until once infeftment was taken by heirs or assignees, and that it did not extend to vassals entered subsequently. In order, therefore, to be in a favourable position for pleading the restriction against all future acquirers of the feu, it will be prudent to insert in the clause express terms to that effect. In order to be effectual against singular successors, the clause of pre-emption must enter the sasine; *Gall v. Mitchell*, 6th February 1729. An obligation of pre-emption has been held not to strike at a building lease for nineteen years, granted without the superior's consent; *Lumsden v. Stewart*, 4th February 1843.

The second condition to which we have referred is the prohibition of subinfeudation, which is made by a declaration, that the vassal shall have no power to sell or dispose of the feu to be held of himself or his heirs, or of any other interjected superior; but only to be held of and under the granter. Although this condition is naturally agreeable to the principles of the feudal system, the competency of it also was doubted after the Statute of 20 Geo. II. Nevertheless, it is a condition of the most frequent occurrence in practice, and its validity was discussed in the case of *Campbell v. Dunn*, 28th May 1823, where the

M. 2343.
M. voce
"Clause,"
App^r. No. 3.
M. voce "Per-
sonal and
"real," App^r.
No. 2; 8 Ross,
L. C. 289.

1 D. 116.

M. 10,306.

5 D. 501.

CLAUSE PROHIBITING SUBINFEUDATION.

2 S. 341.

PART III.

CHAPTER II.

1 Wil. & Sh.

App. 690.

6 S. 679;

3 Ross, L. C.

291.

CONDITIONS—
WHEN BINDING
ON SINGULAR
SUCCESSORS.

CONDITION IM-
PLYING PERMA-
NENCY.

12 D. 1047.

1 Macq. App.
668.

Inst. ii. 3, 13.

M. 2342.

prohibition to subfeu was held effectual by a majority of the Judges. Upon appeal, 20th June 1825, a remit was made by the House of Lords to take the opinion of the whole Judges. The result was a great difference of opinion, but the prevailing sentiment was, that the feu right is qualified by such a condition—that it is not contrary to the provisions of the 20 Geo. II. cap. 50—and that, although it does not constitute a real burden, yet it is binding on purchasers, and the superior is not bound to receive them on any other terms than those which he has lawfully stipulated in the contract. These opinions are reported 4th March 1828.

It is thus clear, that these reservations are effectual as between the contracting parties. How, then, shall the obligations which they impose upon the vassal be extended against purchasers, or those who shall acquire by legal diligence? As a general principle, it may be stated, that a distinction is to be made between a reservation of the nature of an obligation to do a specified thing, which may be performed, and so extinguished by one act, and the reservation, on the other hand, which, by its own nature, or by its connexion with the subject of the grant, is necessarily continuous, and implies a permanent endurance. In the former case, viz., a reservation which can be satisfied by one act of the donee, as, for instance, the payment of a sum of money—the reservation is accounted personal to him, and will not be extended so as to affect singular successors, unless, by the clearest language, it be fixed upon the subject, and made real: of this we shall have distinct illustrations when we come to treat under heritable securities of reserved real burdens. But, when the burden is one implying permanency, as a limitation in the mode of using the property, or a prohibition against building, or such reservations as we have now treated of in regard to pre-emption and subinfeudation, the condition will attach to singular successors, if clearly intended to affect them, although it be not made, or not capable of being made, a real burden. And this effect it produces by its own strength as a lawful condition stipulated by the granter. Of this we have an example in *Clark v. City of Glasgow Life Assurance Co.*, 20th June 1850, where a stipulation, that the vassal should keep houses constantly insured to a specified extent against loss by fire, and regularly pay the premiums, was held, although not made a real burden on the subject, an essential condition of the right, transmitting against singular successors. The case was affirmed on appeal, 8th August 1854. Mr. Erskine was of opinion, that, notwithstanding a prohibition to alienate without making the first offer to the granter, a disposition, without his consent, would be valid, if the vassal's right contained no irritancy, that is, no clause declaring acts done contrary to the stipulation to be null and void. But the decision in *Stirling v. Johnston*, 4th January 1757, upon which that doctrine is rested, has been shewn by Lord IVOXY, in his

note to the passage, to be imperfectly reported; and it is agreed by the most eminent Lawyers, that, while the decision was correct in its result, it was placed upon an erroneous ground. The case was a disposition granted to a stranger in the face of a clause of pre-emption in favour of the superior inserted in the charter, but not repeated in the sasine. The disponent admitted his knowledge of the clause, although it did not appear in the record; and Lord KAMES, who was 5 Br. Supp. 323. Ordinary, reduced his right on the ground of *mala fides*, upon which Lord KILKERRAN remarked, that, as he knew of the condition, so he knew that it was ineffectual in law, and, therefore, *mala fides* was excluded. The Court held, that the condition being inserted in the charter was to be held *in eodem corpore* with the infeftment—a view, which is untenable, when it is recollected, that the charter does not enter the record. But they altered the judgment on the ground that there was no irritancy. This doctrine, however, is not elsewhere supported, and it is repudiated by Mr. Bell, Lord IVORY, the opinions of the Judges in the case of *Preston*, and the unanimous opinion of the Judges *Supra*, p. 575. in the case of *Tailors of Aberdeen v. Coutts*, 3d August 1840. These 1 Rob. App. 313; 3 Ross, L. C. 269. views will be found very clearly stated in the opinion prepared by Lord COREHOUSE in this case, where he shews also the distinction between irritancies in entails and irritancies in other deeds. The power of disposal is inherent in the right of property; and it cannot at common law be absolutely barred, but, when the prohibition is of a qualified nature, it is sustained as a condition of the grant; and thus, before 1748, the clause *de non alienando* was valid, because qualified by the allowance to dispoise with the superior's consent, and so a clause of irritancy made the deed void as contrary to the terms of the contract. But in entails irritancies stand entirely on the statute 1685, cap. 22, and operate, as we shall afterwards see, by a legal fiction dissolving the grantee's title before his act in contravention of the entail is completed, so as to render the act void, not as being inconsistent with the title, but as flowing from one who has no title. An irritancy, then, is not requisite to render effectual a lawful condition, but the clause of irritancy is not, therefore, to be rejected. Although not required to make the condition effectual, it may serve as a stringent means of enforcing it. Thus, in the case of *Tailors of Aberdeen*, there was a penalty of £100, if the grantee should fail to erect houses. According to the legal construction of such clauses, that penalty would have been restrictable to the amount of damages that could be proved, and this remedy, therefore, might have been troublesome and inconvenient. But, besides the penalty, it was stipulated by a clause of irritancy, that the grantee should, upon failure, lose all right and title, and that the ground should, in that event, revert to the granter. This irritancy could have been made effectual by declarator, and its operation would have been avoided only by performance before decree.

DISTINCTION
BETWEEN IRRITANCIES IN
ENTAILS AND
IN OTHER
DEEDS.

EFFECT OF
CLAUSE OF
IRRITANCY.

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EFFECT OF CON-
DITIONS UPON
THIRD PARTIES.

The test by which it is to be determined, whether a third party deriving right from the vassal is bound by conditions in the grant, varies according to the condition of the title. As long as the title continues personal, it is effectual against third parties, because they must found upon the personal title in order to substantiate their claim, and they cannot both plead the personal title and repudiate its conditions. Again, although infeftment may have passed in favour of the vassal, the conditions are valid as between the superior and a disponee whose title is only personal, and who has it not in his power to acquire any other right with resorting to the superior; see the case of *Campbell*, already cited. But, when the question is about real rights, *i.e.*, rights completed by sasine, the effect of conditions as against disponees and other third parties depends upon the insertion of the conditions in the grantee's sasine, and consequently their appearance upon the record. If the condition does not appear upon the record, it is not obligatory upon third parties. But the mere presence of a condition in the charter imports no obligation upon the vassal to insert it in his sasine; and, even if there is added a declaration that it shall be inserted, that is not sufficient, for this declaration also may be disregarded with impunity. It becomes, therefore, important to ascertain in what manner insertion in the sasine and upon the record may be secured. Two methods have been adopted to effect this:—(1.) There is subjoined to the prohibition an irritancy, declaring that acts done contrary to it shall be null and void, and, after stipulating that the condition shall be engrossed in the instrument of sasine, and in all future renovations of the feu in favour of heirs or disponees, there is added a declaration, that the sasines, conveyances, or other writs, in which the conditions are not so engrossed, shall be null and void, and that the granter of any right contrary to the condition or in which it is not engrossed, shall forfeit and amit his right to the subjects, and that this irritant and resolute clause shall be engrossed, as well as the condition. No Conveyancer will think it safe to disregard clauses so stringent as these. (2.) Insertion in the sasine may be rendered unavoidable, and so secured, by making the conditions a part of the precept of sasine. At all times this was a good method to insure that the conditions should enter the record, and it is so now more than ever, the exact transcription of the precept into the instrument of sasine being by the recent Infeftment Act rendered, as we have seen, matter of statutory solemnity.

6 S. 679; *supra*,
p. 575.

INSERTION OF
CONDITION IN
SASINE, HOW
SECURED.GENERAL RE-
FERENCE IN
SASINE TO CON-
DITIONS.
M. 10,306.

It is quite certain that nothing but full insertion in the sasine will suffice. A general reference was held insufficient against creditors or singular successors in *Duke of Argyle v. Creditors of Barbreck*, 13th February 1730. The necessity of full insertion is now limited, however, to the first sasine, and, if the conditions have once entered the record in an instrument of sasine or of resignation *ad remanentiam*,

then, by the 5th section of the Lands Transference Act, it is sufficient to refer to them as contained in such instrument, which is to be described by the name of the party in whose favour it was passed, the register in which it is recorded, and the date of registration ; and such reference is declared equivalent to, and to have the same legal effect as, full insertion. Inconsistent statutes are repealed so as to make this enactment effectual.

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In order to secure the interests of the superior, it is important that infestment should pass in favour of the vassal, because, if he shall die without being infest, the feu will not be in non-entry, and the casualties of superiority will not be exigible, the heir having it in his power to obtain infestment by connecting himself with the unexecuted precept in the open charter without going to the superior. In order to guard themselves against this risk, as well as to insure insertion of the conditions in the instruments of sasine, a condition is sometimes inserted that the infestments in favour of the vassals shall be prepared and passed by the superior's own agent. This point was first discussed in *Stewart v. Burnside*, 12th November 1794, where the condition was not express, but it was stipulated that the vassal should pay the expense of the charter and of the other writs necessary at entering. Infestment was taken by the superior's agent in favour of the vassal, but without his authority. This was ingeniously defended upon the analogy of the *pares curiæ*, in which everything was done by the superior, and also on the ground that, unless the grantee were infest, there would be no power to compel an entry at his death, declarator of non-entry being incompetent where there has not been a vassal. But the Court held that the superior's agent had no claim to the expenses, unless he could show that he had been instructed by the vassal, and observed that his pleas had no foundation in law or practice, and that the charter being in favour of assignees, the grantee was clearly entitled to assign the unexecuted precept—a right which would be defeated by his infestment. In Bell's Commentaries it is said that in one case, *Macritchie*, 21st January 1801, the Court, on the ground of professional usage, gave effect to a condition that infestment should be taken by the superior's agent ; and a condition with an irritancy attached to it, that the superior's agent should write the disposition and infestment in every transmission of the feu, was supported by an opinion of the majority of the Judges in the case of *Campbell*, already cited. But it was strongly objected to by the minority, who held it as objectionable "as if it were stipulated that the vassal should always come to Glasgow by a particular coach, or employ a tailor, butcher, baker, or doctor to be named by the superior." The case of *Campbell* was settled by compromise, the superior having become satisfied, it is understood, that it was not truly for his interest to insist upon such conditions ; and it is

CONDITION
THAT SUPERIOR'S AGENT
SHALL EXPEND
INFESTMENT.

Bell's Folio
Cases, p. 75 ;
M. 15,027.

I. p. 26.

- PART III.** worthy of remark, that the opinion of Lord GILLIES, who maintained the invalidity of such conditions, was noticed by Lord BROUGHAM, in the first review of *Tailors of Aberdeen*, as having met with no answer. And in the second review of that case the stipulation is viewed unfavourably in the opinion of the Judges, being regarded as similar to an astringency to the superior's smithy, which, having in one case been sustained in the Sheriff Court, the Court of Session allowed the judgment to be advocated; *Yeaman v. Crawford*, 18th December 1770.
- CHAPTER II.**
- 1 Wil. & Sh. App. 690.
- 2 Sh. & M'L. App. 660.
- M. 14,537.

CONDITIONS IN FAVOUR OF VASSAL. These are reservations in favour of the superior. On the other hand, the terms of the charter may be so modified as to throw upon him burdens usually borne by the vassal. This most commonly occurs in practice with respect to two points, viz., public burdens, and the casualties.

- 1. OBLIGATION TO RELIEVE VASSAL OF PUBLIC BURDENS.** The superior may undertake to relieve the vassal of public burdens, but his obligation to do so must be very express and specific, if it is intended to apply to burdens of all descriptions. A general obligation to relieve of public burdens was held not to give the vassal a claim of relief against the superior for the expense of a new manse, which is so much *in naturalibus* of the feu, as to require express terms to relieve the vassal; *Bruce Carstairs v. Greig*, 23d January 1773. The superior has no right to a seat in the parish church, and he is not liable for parochial burdens unless he subjects himself by a special agreement; *Murray v. Scott*, 20th February 1794. In the case of *Ainslie v. Magistrates of Edinburgh*, 19th November 1839, there will be found an effectual exemption from all public burdens and town taxes in the city of Edinburgh, so broad as to exclude all such claims, except a statutory and temporary tax imposed for the benefit of the community.
- M. 2333.
- M. 15,092.
- 2 D. 64.

- 2. TAXATION OF COMPOSITION.** The superior may limit the rights which emerge to him upon the vassal's death. In practice the composition payable for the entry of singular successors is frequently limited, or, as it is called, *taxed*, at a certain specified sum, or, as we have already seen, at a double of the feu-duty, inclusive, or according to agreement exclusive, of the feu-duty for the year of the entry. If it is not taxed, then the purchaser or other singular successor will be liable in a year's rent under deduction of feu-duty and public burdens. When the entry is taxed, the language must be very express in order to give the benefit of it to all singular successors. In *Salmon v. Lord Boyd*, 25th July 1751, the taxation was in these terms, "doubling the feu-duty the first year of the entry of each heir or assignee, as use is of feu-farm." The term "assignee" being appropriate to those to whom transference may be made before infestment, this clause was held not to entitle a dispositive to enter without paying a year's rent. But, in *Hamilton v.*
- M. 4181.
- 15 D. 925.

Dunn, 16th July 1853, the meaning of the term "assignees" being held not to be inflexible, but to be determined according to the intention of parties, it was interpreted to denote disponees after infestment, and, in this particular case, to give to such disponees the benefit of taxation. In *Thomson*, 22d May 1810, a singular successor F. C. was found to have no claim to the benefit of a taxation in favour of heirs and successors. The same was held in *MacLachlan v. Tait*, 2 S. 303. 14th May 1823, where the charter bore "heirs and successors" only, although it was in implement of a previous deed in which the entry was taxed to singular successors. The use of the words "singular successors" excludes all question; *Innes v. Reid's Trustees*, 22d 1 S. 518. June 1822.

The superior may not only limit his rights, he may entirely renounce them; and, if the renunciation does not enter the record, the question arises, whether singular successors of the superior are bound by it. In *Nasmyth v. Story*, 9th November 1748, the casualty of non-entry was renounced and conveyed to the vassal. This condition did not enter the sasine, and at first the Court held that the disponee of the superiority was not bound by it. But ultimately it was decided, that, as the feu-right was expressly excepted from the obligation of warrandice in the conveyance of the superiority, the party, having accepted the conveyance with the burden of the feu, was bound by every clause of the feu-right.

With regard to the part of the deed, in which reservations or conditions in favour of the granter ought to be introduced, the practice according to the Styles formerly in use was various. It is evident that whatever affects the extent of the subject transferred must find its appropriate place in the dispositive clause, which ought to contain full materials for determining the measure of the grant. The *red-dendo*, again, is the proper clause for conditions affecting the feu-duty and casualties. And, with regard to other conditions and reservations, such as the clause of pre-emption, the prohibition to sub-feu, and generally all conditions intended to form permanent obligations upon the future proprietors of the subject, we have already found that it is necessary, in order to their being so constituted, that they appear upon the record, and that their insertion there will be most effectually secured by giving them a place in the precept of sasine. We thus secure notice to all third parties, and so make the conditions binding not only on the granter and his representatives, but upon his creditors also and disponees.

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CHAPTER II.

RENUNCIATION
OF HIS RIGHTS
BY SUPERIOR.

M. 5723.

CONDITION AND
RESERVATIONS,
WHERE IN-
SERTED.

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TRANSMISSION OF HERITABLE RIGHTS—VOLUNTARY TRANSMISSION *INTER VIVOS*—VOLUNTARY TRANSMISSION *INTUITU MORTIS*—JUDICIAL TRANSMISSION—TRANSMISSION TO THE HEIR BY SERVICE, ETC.

HISTORICAL
SKETCH OF
POWER TO
ALIENATE FEU.

OLD FEUDAL
RULES AGAINST
ALIENATION OF
THE FEU.

ACCORDING to the strict doctrines of the feudal system, no transmission of a feu was competent without the superior's consent. It was a grant beneficial to the receiver, and restricted to him and such successors as the feudal lord might be pleased to appoint as the objects of his benevolence. Fidelity and service being its inherent conditions, the very nature of the contract exempted the superior from having vassals imposed upon him who were not selected by himself. He could not, therefore, be required to enter any successor to the original vassal, except those to whom, by the charter, the grant was limited. Besides the restraint thus imposed upon the sale of land, the interest of those appointed by the investiture to succeed the vassal was an additional obstacle, since their consent was required to what was deemed an alienation to their prejudice. It is a remarkable evidence of the firmness of the grasp in which the landrights of Scotland were held by the feudal rules, that these restraints were not subjected to any mitigation until the latter part of the 15th century—that, until the middle of the last century, the superior's power of refusal could only be obviated by a legal device—and that it was not entirely relaxed, until, by the Lands Transference Act of 1847, the last traces of the superior's power to refuse entries to purchasers were removed.

LIMITED POWER
OF ALIENATION
IN TOWNS.

Jus retractus.

Appx. No. 1.

It was but a slight exception to the general principle, that the sternness of the feudal rule made a concession to the sterner demands of the vassal's poverty; and alienation was permitted in towns when the vassal had no other means of escape from starvation. Of this Lord KAMES has presented an example in his Historical Law Tracts, in a sasine, dated 1450, proceeding upon a sale by the proprietor, "*magnâ necessitate compulsus*," "*ad suæ vitæ necessaria supportanda*." Another example is quoted by Ross, where the price is acknowledged as paid to the granter in his "*mykle myster*," i.e., great need. This power was a species of the *jus retractus*; and,

although it is mentioned in the *Leges Burgorum*, we are informed in the *Principia Juris Feudalis* by Alexander Bruce, published in 1713, that it had gone into desuetude long before his time. Even while it subsisted, the rigour of the feudal canon was illustrated by this, that the conveyance to a stranger could only be made after offering the property to the superior, and the vassal's relatives.

It was a more efficient relief which was afforded by the practice of subfeuing. The granting of a subaltern tenure was not regarded as an alienation, for the chief vassal remained invested, and liable for the duties and services. Although some lawyers have viewed such subaltern or base rights as repugnant to feudal principles, they were expressly permitted by the 2d Book of the Feus, upon condition that the inferior vassal should be qualified to serve in the feu. Thus a military vassal might subfeu to a soldier, and he to another, and so downwards *ad infinitum*. Nor is there any doubt, that subinfeudation was practised, and the rights resulting from it regarded with favour, in Scotland before the time of Robert Bruce. But the right of the sub-vassal was exposed to contingencies which rendered it insecure. When not recognised by the superior, he had no claim upon him for protection, and he was, therefore, exposed to the consequences of the feudal casualties being incurred by the delinquency or contravention of the chief vassal; and, as these casualties might infer a total forfeiture of the feu, the derivative right in such an event necessarily perished. The granting of subfeus or *arriere fiefs* was viewed also with jealousy and apprehension by superiors, as rendering their duties and casualties insecure by the divestiture of the immediate vassal, and it was as a penal protection against that injury, that the superior was entitled by the casualty of recognition to resume the entire feu, if the vassal alienated more than the half of it. These embarrassments were remedied in England by the statute, *Quia emptores terrarum*, passed in the 18th of Edward I., by which vassals were empowered to sell their lands to be holden of the capital lords of the feu, subinfeudation being thus abolished, and the consent of the superior supplied independently of his pleasure, by the statute. This Act, with subsequent statutes extending its provisions to the immediate vassals of the Crown, completely liberated the transmission of land in England from the feudal impediments. It is an unsettled controversy whether the statute, 2 Robert I. cap. 24,* professing to enact the same provisions for Scotland as the Act *Quia Emptores*, is, or is not, authentic. Although founded in its preamble upon the prejudice suffered by superiors through subinfeudation, and designed to protect them from that loss to which they were thereby exposed, the effect of its enactments would have been to allow vassals to sell without control, and to make the purchasers hold, not of the sellers,

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p. 212.SUBINFEUDA-
TION NOT RE-
GARDED AS AN
ALIENATION.

Title 34, § 2.

CONTINGENCIES
IN SUB-VASSAL'S
RIGHT.STATUTE *quia*
emptores.

2 Rob. I. c. 24.

* This statute is printed along with the *Regium Majestatem*.

- PART III.** but of the superior for the same services as were incumbent upon the first vassals. Whether this statute is authentic or not, there is no reason to believe that it was ever observed. On the contrary, the prohibition upon alienation continued so stringent, that it was necessary to provide by statute, 1469, cap. 36, for the completion of the title of creditors apprising their debtor's land in satisfaction of their debts. The latter statute formed a direct legislative abridgment of the superior's privilege in the selection of vassals, for he was forced by it to receive either the creditor or any purchaser in the apprising as his vassal, upon payment of a year's rent. By 1672, cap. 19, this power of obtaining an entry was extended to adjudgers, and, by Acts passed in 1681 and 1690, to purchasers of the estates of bankrupts in judicial sales. More than a century before these last-mentioned Acts, the Crown, under a sense of the unsuitableness of the feudal fetters to the exigences of advancing freedom and commerce, had adopted a liberal course towards its vassals, having laid down the rule, as appears from 1578, cap. 66, to grant confirmation upon payment of expenses by the party. The vassals of subject superiors being less favoured were driven to devise expedients for accomplishing indirectly what they could not obtain by direct means; and the impatience of the feudal restraints, as well as the resources of legal ingenuity, were displayed in these efforts, which attained their object through means of bonds granted by the sellers in favour of the intended purchasers, who thereupon adjudged, and, the Court conniving in the manœuvre, which Craig, in his feudal zeal, characterizes as fraud, chicane, and robbery, the superiors were compelled to grant entries under the Acts 1469 and 1672. The Entail Act, 1685, cap. 22, is instanced as another deduction from the superior's power, inasmuch as it enabled proprietors to entail their lands and substitute heirs, uncontrolled by the superior, and without being restricted to the destination prescribed by him in the investiture. But the greatest blow was struck after the rebellion of 1745. That attempt was believed to have drawn its strength mainly from the importance and power conferred upon the heads of Clans by their feudal privileges; and, along with various other abatements of their powers and rights, effected by the 20th Geo. II. cap. 50, a purchaser holding a procuratory of resignation from the last-entered vassal was enabled to enforce an entry by legal compulsitor against the superior, who was deprived of all power to suspend such a requirement, excepting in cases where the party failed to tender the fees and casualties of entry. After the Jurisdiction Act, just referred to, it remained as a vestige of the ancient privilege, that, since that statute specified the form of resignation only, the superior could not be compelled to grant an entry by the other form of confirmation. In some instances this maxim was acted upon, but in general it was regarded as a point of theory rather than
- CHAPTER III.**
- 1469, c. 36.
- RELAXATION OF RESTRAINTS ON ALIENATION.**
- 1672, c. 19.
- 1578, c. 66.
- 1685, c. 22.
- 20 Geo. II. c. 50.

of practice ; and now this last relic has been removed by the Lands Transference Act, which gives power to compel superiors to grant charters of confirmation.

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Having taken this short survey of the general history of the power to alienate heritable property in Scotland, we are now to inquire into the mode of transmission. We shall treat this portion of the subject by examining the different forms in detail, beginning with those which are simple, and then proceeding to others which are composed of parts derived from the elementary forms in combination. But, with a view to perfect explicitness, and to the advantages of a general conception of the subject from the outset, it will be proper first to state in a few words the nature of the leading principles and forms by which the transmission of lands is regulated. Here, as before, we are constantly to keep in view the fundamental principle of the feudal system, viz., that all heritable property is derived ultimately from the Sovereign as in the eye of the law the original owner, and as still superior paramount. Lands are held, therefore, either immediately of the Sovereign, or of the Crown vassals as subject superiors, or of subordinate superiors, to whom these vassals or other vassals in a lower degree have granted subaltern rights. The characteristic and inherent condition of a feu is that there must be a superior and a vassal. But, the feu being in its primary nature a *beneficium*, i.e., a voluntary grant in consideration of services to be rendered, it implied a *delectus personarum* to the superior, so that the vassal, as fixed by the terms of the grant, should not be changed without his consent. That consent could be given effectually only in the presence of the *pares curiæ*. There, accordingly, the act of transmission was performed ; and it might be effected in two ways, either by the vassal resigning the feu into the hands of the superior, to remain with him, if that was the design of the parties, or, if the purpose was to substitute another vassal in room of the resigner, then the surrender was in order to a re-issue of the grant in favour of the party on whose behalf it was resigned. In the latter case, viz., of transmission to a stranger, the superior received the resignation, and again granted the feu to the disponent, admitting him, in the earliest period, by his own act in presence of the *pares curiæ*, and in later times, and after written titles were introduced, by issuing a charter and warrant, upon which delivery of sasine perfected the new vassal's right. In these cases, the transmission is by *resignation*. But the vassal and purchaser might deal with each other in the first instance, the one granting, and the other acquiring, an inchoate right subject to the after approval of the superior. Here the formality of resignation was not necessary. The superior ratified the transaction, accepted of the new vassal in presence of his court, and afterwards issued his charter of confirma-

GENERAL PRINCIPLES AND FORMS REGULATING THE TRANSMISSION OF LAND.

TRANSMISSION BY RESIGNATION.

TRANSMISSION BY CONFIRMATION.

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TRANSMISSION
BY SUBINFEU-
DATION.

tion, which rendered the disponent's right valid from the beginning. This is transmission by *confirmation*. In these instances there was no subinfeudation. The transfer was made to the new vassal, not to hold of the granter, which would have been a subfeu, but to hold of the granter's superior, by substituting the grantee in the vassal's place. These transmissions, therefore, being capable of completion only by the interposition of the superior, were necessarily dependent on his will, until Conveyancers contrived to evade, or the law took away, the privilege of refusal. This subjection to the pleasure of the superior was necessarily a great hindrance to sales, and at an early period, therefore, much of the transference of lands was accomplished by the creation of subordinate feus. The parties did not ask for the superior's approval, but the vassal granted a charter, by which the grantee should hold of the granter. This was not regarded as an alienation, and, although subject to disadvantages, and liable to abuses before the establishment of the registers, the granting of subfeus has, as far back as our records extend, been in a greater or less degree an effectual mode of transferring property in land, by divesting the granter to such an extent as to give the sub-vassal a real right of property without the necessity of the superior's sanction. We shall find in the sequel, that each of these modes of transmission, viz, the one with a holding of the granter's superior, and the other with a holding of the granter himself, has its own peculiar advantages; and the great triumph of modern Conveyancing has been the combination of both methods in the same transaction and deed, the writ of transmission now in use conferring on the disponent the power of at once divesting the granter of the *dominium utile* by an immediate holding of him, and the power also, when he chooses, of converting that subordinate tenure into a holding of the superior by substituting himself in the granter's place.

In these simple propositions is contained the germ of the principles and forms, by which the transmission of heritable rights is regulated. But they are to be regarded merely as a brief enunciation of the heads of the chapter of Conveyancing upon which we are now entering—as the first streaks of rising light upon the summits of the region which we are about to survey.

The transmission of lands is *voluntary*—by the deed of the granter—or it is, in Mr. Erskine's phrase, *necessary*—that is, judicial, by the act of the law giving to the decree of a Judge the same effect as if it were a conveyance by the party. There is another transmission by the force of the law, viz, from the dead to the living; but this will form the subject of a future part of the course. At present we are to speak of transmission *inter vivos*.

I. VOLUNTARY TRANSMISSION *inter vivos*.

The form of conveyance which is most characteristic of the genuine principles of the feudal system is that which produces its effect by resignation alone. Lands may be effectually transferred by a procuratory of resignation—*i. e.*, an authority granted by the vassal to a commissioner or mandatory to resign the feu into the superior's hands, either that the vassal's estate may be absorbed in the *dominium directum*, if the superior be the purchaser, or, if the sale is to a stranger, then that new infeftment may be authorized to the grantee, who is called the resignatary. This is an effectual mode of conveyance, and the procuratory of resignation may be used for these purposes in a separate form, or it may be embodied, as it generally is, in the deed which is appropriated by practice to the transmission of heritable rights. That deed is the *DISPOSITION*. The assignation is the appropriate form for transmitting moveable rights; but it is also used in combination with the disposition in the transference of such heritable rights as have not been made real by infeftment, but stand upon a personal title. Mr. Ross notices three acts or stages in the process of transmission, *viz.*, 1. The resolution to dispoise—*i. e.*, when the owner has made up his mind, but as the resolution remains with himself, by itself it can produce no effect. 2. The obligation to dispoise. This is implied in the missive of sale, and may form a ground for compelling the owner to convey, but it does not of itself transmit. And, 3. Consent *de præsenti*, that the property do become the disponee's. This is the act of alienation, and forms the substance of the disposition, which contains the operative words of transmission, along with the granter's warrant for the completion of the grantee's right by delivery of possession either immediately, or through the medium of the superior. The person who conveys is called the *disponer*, or the disponee's author. He who acquires is called the *disponnee*, and, in contradistinction to one who acquires by inheritance, the disponee is termed a *singular successor*, because, while an heir in heritage incurs a universal representation, or liability for his ancestor's debts, he who takes by a disposition in his favour is liable only to the extent of the single subject which he receives.

It may be convenient to point out here the distinction between conveyances in which the disponee is to hold of the superior, and those intended to create a holding immediately of the granter. A disposition intended to make the disponee hold of the disposer's superior is called a disposition *a me*, because the lands are to be holden, not of me, but *a me de superiore meo*, *i. e.*, from or away from me of my superior. The preposition *a* here is disjunctive. It stands beside the person whose connexion with the feu is to cease. *De*, on the

DISPOSITION
a me.

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DISPOSITION
de me.PUBLIC AND
BASE RIGHTS.

other hand, fixes the feudal relation. It is the word which links the vassal to his superior. A disposition *de me*, accordingly, is a conveyance of lands to be held by the disponent immediately of the disponent as his superior.

A right to lands with a holding *a me*, is called a *public right*, because originally completed by the superior's public reception of the new vassal in presence of the *pares curiæ*. A holding *de me*, on the contrary, is called a *private right*, because, Mr. Erskine says, it was customary to grant such rights secretly, and before the institution of the registers there were no means of discovering them. But the term *private right* may also with probability be ascribed to the same origin as public right, inasmuch as the vassal in the private right did not require the overlord's confirmation, and was not, therefore, received in his court. Base or private rights are also familiarly termed *subaltern*, because placing the holders of them in a rank farther removed from the lord paramount than the grantor is. These distinctions embody also an element drawn from the early difference of *status* in the different orders of vassals. Those who held immediately of the Crown, and were said to hold *in capite*, were noblemen, and their rights as well as those of their immediate vassals were reckoned *noble* and *public*, while all of lower degree were regarded as *ignoble*, *base*, and *private*. The distinction between *a me* holdings or public rights, on the one hand, and private rights held *de me*, on the other, possesses, as we will soon discover, a significance the most vital in determining the import and effect of the rights of property constituted by them.

TRANSMISSION
BY RESIGNA-
TION.

We are now then to examine the different modes by which the feu, having been constituted by charter and sasine, can be transferred by the vassal to another person; and, agreeably to the plan of taking first the methods most consonant to the genius of the feudal polity, we commence with TRANSMISSION BY RESIGNATION.

This form of transferring land is of high antiquity. The recognition of the feudal chief as the source and guardian of the vassal's estate was an act naturally accordant to the feudal relation, and it could not be performed upon any occasion more appropriately than when the vassal, having sold his feu, restored it into the hands by which it had been bestowed, in order that it might be conferred by the same power upon the new vassal, and carry with it the same assurance of protection. The transference of lands by resignation is made by a symbolical, and not a real delivery, and never required, therefore, to be made upon the ground of the lands, but could be executed anywhere. The use of the symbol flowed from the doctrine so deeply settled in the Roman jurisprudence, as well as the feudal, that property could be effectually transmitted and acquired only by

tradition. The proper symbol of resignation has always been the *festuca* or *fustis*, the baton, in room of which immemorial usage has adopted a pen. If the purpose of the act was to re-convey the *dominium utile* to the superior, he received the symbol and retained it; when the intention was to transfer the property to a stranger, the superior, after receiving the symbol, delivered it to the purchaser, which was to him the earnest of a charter and warrant of infeftment, to be afterwards granted in his favour. The effect of resignation in relation to the right of the resigner was called *dis-sasine*, which gives a correct view of the effect of the act after the new vassal is invested, upon which, and not sooner, the resigner's title is extinguished. Resignations are treated of by Sir Thomas Craig in his last book, which contains the doctrines relating to the loss of the feu; and in this he is partly followed by others who handle resignation for the superior's benefit as the conclusion of the subject, being the extinction of the feu. This is, no doubt, in consistency with principle. But, in every practical sense, resignation is a mode, and the strictly feudal mode, of conveyance, and it will tend very much to perspicuity to begin with it; and, in the first place, we shall consider the conveyance of the feu to the superior, which is effected by RESIGNATION *ad remanentiam*.

This takes place when the superior has made a re-purchase of the feu, or is to be re-invested in it from any other cause. Here we must keep in view the position of the parties. We are to remember, that the grant of the feu did not extinguish the superior's infeftment. That, on the contrary, remains an effectual title to the lands subject to the vassal's right to the *dominium utile*. The object, therefore, is to convey the *dominium utile* to the superior, so that that estate which is called *the property* may be reunited, or, as it is termed, consolidated with *the superiority*, to the end that the superior may again possess the whole as one estate in the same way as he did before granting the feu. The nature of this transmission is well illustrated by the name given to it in England, viz., *surrender*, from *sursum reddo*, I restore upwards to my feudal lord the estate which he conferred. Although by the feudal principles a vassal could not alienate without consent of his superior, that did not prevent his returning the feu to him; and this he could do even without the superior's consent, it being with certain exceptions a privilege of the vassal to refute, i.e., to surrender, the feu *invito superiore*. But with us, as we have already seen, the feu charter being of the nature of a contract, the vassal cannot refute without the superior's consent.

PURPOSE OF
RESIGNATION *ad*
remanentiam.

Supra, p. 573.

Sir Thomas Craig has described circumstantially the form of resignation in favour of the superior, which is called resignation *ad remanentiam*, because made in order that the *dominium utile* may permanently remain with the superior; and we shall quote it as embodying

PART III. the essence of this mode of conveyance :—"The vassal himself, or his
 CHAPTER III. "lawful procurator specially authorized for the purpose, ought to
 Lib. iii. *diég.* 1. "appear before the superior, and reverently, as becomes a vassal,
 "with all humility, in presence of a notary and witnesses, to utter
 "these words:—'My Lord Superior of this feu, this my feu I resign
 " 'in your hands, and simply renounce, that it may remain with you
 " 'and your heirs for ever, and be consolidated with the superiority
 " 'or *dominium directum*;' and the rod or wand which he shall have
 "in his hand he shall deliver to the superior, and the superior shall
 "thereupon demand an instrument from the notary, and beg the
 "witnesses to remember the transaction." These, Craig says, were
 the extrinsic solemnities, essential in law, and not to be presumed
 without proof, viz., that the vassal was present by himself or a pro-
 curator, and that the superior received the delivery, and, in token of
 his acceptance, demanded an instrument of the notary, and gave him
 money on the spot for the instrument. The essentials of the transac-
 tion remain the same, as we shall find on examining the forms of the
 conveyance used for this purpose. It is the

Disposition by the vassal to his superior.—It consists of the follow-
 ing clauses :—

1. THE NARRA-
TIVE CLAUSE. 1. *The narrative*, containing the granter's name, the consideration,
and discharge, where the consideration is a price.
2. DISPOSITIVE
CLAUSE. 2. *The dispositive clause*, which contains the operative words of
transmission, "*sell, alienate, and dispose*," and also, like the charter,
the *habendum* or destination, and the description of the subject. It
is always the purchaser's privilege to dictate the destination in a
conveyance, and this point requires particular attention here. The
object being to consolidate the two feudal estates into one, it is neces-
sary that the destination of the property in favour of the superior
must be to the same heirs to whom the superiority stands destined,
otherwise the amalgamation cannot be perfect. The rule, therefore,
is to insert here the same destination as in the titles of the supe-
riority, in order that the *dominium utile* may be consistently absorbed
in the higher right. When the series of heirs is different, the pro-
perty will not necessarily be regulated by the destination of the
superiority. In *Galbraith v. Graham*, 14th January 1814, the supe-
riority of certain lands being entailed, the heir in possession acquired
the property of the same lands by a disposition in favour of himself
and (not the heirs of entail, but) his own heirs and assignees whatso-
ever. Resignation *ad remanentiam* having been made, it was con-
tended that the *dominium utile* had been brought under the fetters
of the entail, but the Court held that it remained a fee-simple estate,
subject to the disposal of the acquirer and his heirs. A different
rule obtains when the *dominium utile* has been originally entailed,

DESTINATION
OUGHT TO BE
SAME AS IN
THE TITLE OF
SUPERIORITY.

F. C.

and disposed under powers of impignoration contained in the entail. So, where a wadset had been granted by virtue of such powers, and afterwards redeemed, although (according to Stair, differing from Erskine,) resignation *ad remanentiam* is necessary to reunite the lands given in wadset, no separate right remains after that act, but the lands are again brought under the entail; *Duke of Roxburgh v. Wauchope*, 13th June 1822. The words of style appended to the dispositive clause, "*together with all right*," &c., will be explained when we examine the disposition with double holding, which is the most frequent in practice.

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1 WIL. & SH.
APP. 41.

3. In accordance with the Lands Transference Act, we next insert the *term of entry*.

3. TERM OF
ENTRY.

4. The next clause is the *Quæquidem*, deriving its name from the first word in the Latin form. Its office in general is to deduce the title of the lands, so as to connect the right of the granter with the vassal to whom the superior granted the feu:—"Which lands are holden by me of the said B. as my immediate lawful superior of the same in feu farm," &c. In this instance an articulate destination of the title is not requisite, but the terms used shew the feudal relation between the parties, and thus point out the peculiar character of the conveyance required.

4. Quæquidem
CLAUSE.

5. *Obligation to resign*.—This is introduced with a statement of the purpose of the resignation, viz.:—"To the effect that my right of property of the said lands may be consolidated with the said B.'s right of superiority, I bind and oblige me, my heirs and successors, to make due and lawful resignation of the same in the hands of the said B. as my immediate lawful superior thereof AD PERPETUAM REMANENTIAM." These words explain themselves, and they are immediately followed by

5. OBLIGATION
TO RESIGN.

6. *The Procuratory of Resignation*.—This is a mandate to procurators (whose names are left blank) to appear before the superior or his commissioner, "and there, with all due reverence and humility, purely and simply by staff and baton, as use is, to resign and surrender, as I do hereby resign and surrender, SIMPLICITER upgive, overgive, and deliver the lands, &c., in the hands of the said B. or of his commissioner in his name, as in his own hands and for his behoof, AD PERPETUAM REMANENTIAM, to the effect that the right of property, which stood in my person, may be established and consolidated in the person of the said B. with his right of superiority of the same, and remain inseparable therefrom in all time coming."

6. PROCURATORY OF RESIGNATION.

We have cited the words of the Style hitherto in use, because they express the nature and effect of the resignation authorized. But the short form in schedule A, appended to the Lands Transference Act, may be used, being declared by the third section to be equivalent to a procuratory of resignation *ad remanentiam* in the case of convey-

NEW FORM OF
PROCURATORY.

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ance by a vassal to his superior. There is this awkwardness, that the words of the schedule are:—" *I resign the said lands and others for " new infeftment."* But resignation *ad remanentiam* is not " for new " infeftment," and under the power of adaptation given by the first clause it may be proper to omit these words in this case.

COMMISSION TO
RECEIVE RESIG-
NATIONS.

8 & 9 Vict.
c. 35.

By the old style, resignation was authorized to the superior or his commissioner; and, in order to receive such resignations, a special commission was required. But that is rendered unnecessary, where the superior has an agent, by the eighth section of the Infeftment Act, which allows resignations *ad remanentiam* to be accepted by the superior's known agent for the time.

The remaining clauses of this deed may all be in the new form. They are—

7. Assignment and delivery of writs.

8. Assignment of rents.

9. Relief of public burdens, prior to the entry. Here it is, of course, unnecessary to give relief of feu-duties and casualties (as in the new style,) the disponent being himself the creditor in these.

10. Clause of warrandice.

11. Clause of registration.

There is, of course, no precept of sasine, for the purpose is not to grant an infeftment, but to relinquish one.

The deed is completed by

12. A testing clause in ordinary form.

CEREMONY OF
RESIGNATION.

When this deed is delivered, it is for the superior to complete his title under it by executing the procuratory, and expeding an instrument. The act of resignation consists in the appearance of a procurator for the granter, in presence of the superior, or of a commissioner holding his special authority to receive resignations, or of his known agent, and there, before a notary and two witnesses, resigning the lands by the symbolical delivery of staff and baton (for which, by universal practice, a pen is used) to the superior, or the person so acting for him. The use of any formula of words in resignations has fallen into disuse. The superior, or the person receiving resignation on his behalf, thereupon takes instruments in the notary's hands.

ACCEPTANCE
BY SUPERIOR
OF RESIGNATION
ESSENTIAL.

With regard to this ceremony, and the instrument which follows, it is necessary to keep in view, that they import a transaction of great importance, viz., a completed transference of the feu from the vassal to the superior, by which, as the vassal is divested of the property, his liability for the duties and casualties is terminated. It is, therefore, important to the vassal that there should be no doubt as to the validity of the superior's acceptance of the resignation, for it is upon that acceptance that the transference depends, this being in truth a refutation of the feu, which the superior is not bound to receive

against his will. The instrument accordingly bears, that, upon the resignation by delivery of staff and baton, the superior accepted of the same. In most cases the superior's consent will appear from the nature or terms of the transaction, but in circumstances of any dubiety, it is necessary that the Conveyancer keep steadily in view the feudal principles by which the transaction will be tested.

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A considerable laxity and variety of practice in the symbols used in resignations had arisen at the beginning of last century, which gave occasion to the Act of Sederunt, 11th February 1708. Some infestments of subjects in Edinburgh having been produced, bearing resignation by delivery of earth and stone, the Lords discharged in future the use of any other symbol than staff and baton, under pain of nullity; and this rule is supported by subsequent decisions. In *Carnegy v. Cruickshank's Creditors*, 2d December 1729, a sasine within the burgh of Aberdeen was found null upon this Act of Sederunt, because made with the symbols of a penny money and earth and stone, though these symbols were in conformity with the old custom in that town; and, in *Earl of Aberdeen v. Duncan*, 25th June 1742, the rule was again enforced, although it appeared that, out of 339 resignations in Aberdeen made after the Act of Sederunt, all but sixteen had been made by a wrong symbol. The rule is, therefore, fixed, and it applies to all resignations.

SYMBOLS IN
RESIGNATION.
A. S., 11th
Feb. 1708.
M. 14,316.
M. 14,316.

The resignation is attested by a notarial instrument, the terms of which it is unnecessary to recite, for it contains only a simple narrative of the ceremony which we have described. A form is given in the Juridical Styles; but it is proper to mark as to it, that the instruments must be taken by or on behalf of the superior in whose favour the resignation is made, and not by the procurator, for he acts for the disponent. This is correctly given in the supplement to Spottiswoode, The form of instruments of resignation *ad remanentiam* is retained by § 8 of the Infestment Act, 8 & 9 Vict. cap. 35, excepting that the notary's long docquet is dispensed with. He will, of course, attest every page with his subscription, prefixing his motto upon the last page. The Act 1681, cap. 5, expressly requires subscribing witnesses to this instrument; and, as they are still witnesses here to the facts attested, they should subscribe every page. This instrument, like the sasine, is protected from challenge on the ground of erasures, not fraudulent, by the Act 6 & 7 Will. IV. cap. 33. A part in which accuracy is indispensable is the reference to and description of the disposition or other deed containing the procuratory, which is the warrant. In *M'Millan v. Campbell*, 4th March 1831, Lord MONCRIEFF held an error in reciting the date of the procuratory (25th instead of 24th March) to be fatal. The case was affirmed in the House of Lords, but without notice of this point.

INSTRUMENT OF
RESIGNATION.
i. 663, 3d edit.
p. 247.

NOT CHALLENGEABLE ON
GROUND OF
ERASURE.

RESIGNATION
proprio manibus.

Resignation *ad remanentiam* may be effectually made by the hands

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Ersk. Inst. ii.
7. 20.

ii. 11, 3.

ii. 225.

of the vassal himself, without any procuratory or other warrant preceding. But in this case the resigner must, in conformity with 1555, cap. 38, and 1563, cap. 81, subscribe the instrument himself as well as the notary. Stair holds, that, where there is a preceding obligation to resign, the vassal's subscription is unnecessary; but Mr. Ross properly recommends, that the resigner should subscribe wherever there is not a procuratory.

Resignations *proprieis manibus* are not protected from vitiation by erasure.

REGISTRATION
OF INSTRU-
MENTS OF
RESIGNATION
ad rem.

1669, c. 3.

The instrument of resignation *ad remanentiam* was not required to be recorded by 1617, cap. 16, which does not refer to resignations, and it was, therefore, left in the vassal's power to contract with a third party after granting the procuratory. This was remedied by 1669, cap. 3, which requires instruments of resignation *ad remanentiam* to be recorded within sixty days after their date, in the same way as sasines, under the pain of nullity. This Act is still in force, and as the Infertment Act contains no new regulation for the registration of instruments of resignation, (as it does for the registration of sasines,) the instrument will be null if not registered within sixty days of its date. The instrument duly recorded has the effect totally to divest the vassal, by extinguishing the subaltern right, and reviving the *plenum dominium* in the person of the superior. Of its complete efficacy in producing this result there is a remarkable example in *Walker's Representatives v. Governors of Heriot's Hospital*, 28th June 1839. Here, a vassal, who had right by his charter to relief from stipend, resigned *ad remanentiam* for the purpose of creating a vote under the old system of electing members of Parliament; and, after the object was served, he re-acquired the feu by a new title, in which, however, the superior's obligation to relieve was not repeated. The original title was held to be so completely extinguished, that the vassal could not revert to it in support of his claim, and he was found no longer entitled to relief. This case may be compared with *Magistrates of Edinburgh (Governors of Trinity Hospital) v. Nisbett's Trustees*, 18th June 1851.

EFFECT OF THE
REGISTRATION.

1 D. 1132.

13 D. 1161.

SUPERIOR BY
RESIGNATION
TAKES ESTATE
UNDER BUR-
DEN.

When a feu returns to the superior by the operation of the feudal rules, as by non-entry, it reverts as free and unburdened as when he granted it, not being subject to securities or deeds granted by the vassal to which the superior has not consented. This rule does not extend to liferent escheat, which is not one of the genuine feudal casualties, being the consequence of denunciation for an offence not against the superior, but against the Sovereign. The superior, therefore, takes the estate under liferent escheat, subject to every burden and deed affecting it granted by the vassal. And the resignation *ad remanentiam* being consented to by the superior, it implies a consent to all the burdens imposed by the vassal, and the superior accordingly receives it subject to such burdens.

Ersk. Inst. ii.
5, 7, & ii. 7, 21.

It may be noticed here, that a procuratory of resignation *ad remanentiam* does not fall by the death of the granter or grantee. The Act 1693, cap. 35, continues in force procuratories of resignation and precepts of sasine, as warrants in favour of the grantee's heirs, assignees, and successors, having right by general service, disposition and assignation, or adjudication. But, in compliance with this Act, it is requisite that, in instruments made after the death of either party, the title of those in whose favour it is made be deduced, (*i.e.*, the steps of it specified,) under the sanction of nullity.

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PROCURATORY
OF RESIGNA-
TION DOES
NOT FALL BY
DEATH.
1693, c. 35.

It only remains to notice that resignation *ad remanentiam* is the only form by which after sasine a feu can be re-absorbed in the superior's title. Renunciation will not suffice for that purpose, because it is personal merely, and has no operation in the transmission of real rights perfected by sasine, excepting such as are of the nature merely of burdens on the radical title; *Dumbar v. Williamson*, 23d November 1627.

RENUNCIATION
INSUFFICIENT
TO RE-ABSORB
PROPERTY INTO
SUPERIORITY.
M. 570.

We are now to suppose that the vassal's estate is to be transferred, not to the superior, but to a stranger; and, in order to present the subject in a form perfectly clear and systematic, we shall take first, and confine ourselves to, transmission by a public holding, the object being that the disponee shall hold, not under the vassal, but of the vassal's superior. This, as we have seen, may be effected either by resignation or by confirmation. But, in either case, the completion of the title can only proceed upon the warrant of the vassal, which is contained in a disposition by him. We are now then to consider

The Disposition with holding A ME.—This is not the most common form of the disposition, which, as we have stated before, combines warrants for both public and private holdings. But it is a form still met with not unfrequently in practice, in cases, for instance, where subinfeudation is very stringently prohibited. The *a me* holding alone is necessarily used also in conveyances of the superiority, because the superior cannot grant a *de me* tenure, since that would interject another superior between himself and the vassal. The disposition of superiority will demand a separate consideration on account of its peculiarity in other respects. At present, therefore, we are to consider the disposition by a vassal of his feu to a stranger, to be held by the disponee of the superior only. And here it may be mentioned, that we will reserve many observations upon the disposition and its clauses, until we come to treat of the form of it containing double manners of holding, which is the most frequent mode of transmission. At present, accordingly, our observations are confined, as regards the disposition, to its form in this particular use of it.

There is no example given in the Juridical Styles of this form of

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the disposition ; but its clauses are the same as those of the disposition in its simplest form, with the exception of the obligation to infeft. We have

1. THE NARRATIVE.

1. *The introductory clause*, containing the names of the disponer and disponent, and the consideration, and, if that is a price, the discharge of it.

2. THE DISPOSITIVE.

2. *The dispositive clause*, containing the operative words, the *habendum* or destination, and the description of the lands ; and now the term of entry is subjoined to this clause.

3. OBLIGATION TO INFEST & ME.

3. *The obligation to infeft*.—In the disposition this clause comes in place of the *tenendas* of the charter. There the lands are appointed to be holden of the granter. But that is not the intention in the *a me* disposition, which is to give a holding not of the granter, but of the superior. The clause, therefore, according to the previous forms, is to this effect :—“*In which lands and others I bind and oblige myself to infeft and seise the said B. and his foresaids upon their own charges and expenses : To be holden from me and my foresaids, of and under our immediate lawful superiors of the same, in the same manner, and as freely in all respects, as I, my predecessors, and authors, held, hold, or might have holden the same, and that either by resignation, or confirmation, or both, the one without prejudice of the other.*” This is the clause which determines the feudal character of this deed, as designed to authorize a public holding only *a me de superiore meo*. By the schedule to the Lands Transference Act the clause may be simply :—“*I oblige myself to infeft the said*” (disponent) “*and his foresaids to be holden A ME ;*” and these words are declared by the second section to imply an obligation in terms of the full clause previously used, and of which we have quoted the words.

4. PROCURATORY OF RESIGNATION.

4. *The Procuratory of Resignation*.—In the resignation *ad remanentiam* we have seen, that the procurator is authorized to resign into the hands of the superior for his own behoof, that the property may be consolidated with, and constantly remain inseparable from, the superiority. But here the object is different ; the lands resigned are not to remain with the superior, but to be of new granted by him to the disponent. Accordingly, in this case, the procuratory, according to the previous form, constitutes persons, not named, as procurators to appear before the disponer’s immediate lawful superiors, or their commissioners, and there to resign and surrender the lands in the hands of the superiors, not for themselves, but in favour and for new infeftment to be granted to the disponent, and his heirs and assignees ; and the procurators are authorized to take instruments. Enough has already been said to shew the main import and design of this clause. We shall have occasion to examine minutely the effect of the surrender which it authorizes, when treating of the charter of resignation. The omission of the important words, “*for new infeftment,*” was held

not to be fatal to a transmission dependent mainly on this clause, it being the case of a bond of entail, in which the conveyance was made by procuratory of resignation, the remainder of the deed being sufficient; *Munro v. Munro*, 15th February 1826, affirmed 25th July 1828. The resignation not being *ad remanentiam*, the superior was bound to return the lands to the party and his heirs.

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4 S. 467; 3 Wil.
& Sh. App. 844.

The remaining clauses, in the order of the schedule to the Lands Transference Act, are as follows, viz :—

5. The assignation and delivery of writs.
6. The assignation of rents.
7. The clause of relief of feu-duties and burdens.
8. The clause of warrandice.
9. The registration clause.
10. The precept of sasine.
11. The testing-clause.

Such of these clauses as have not already engaged our attention will be examined when we have in hand the disposition with double manner of holding.

As the obligation by this disposition is to infest the disponent by a holding, not of the disponent, but of his superior, the seller cannot be divested, or the title of the acquirer feudally completed, except by the superior's act. This may be obtained in two ways, RESIGNATION, and CONFIRMATION.

The effect of resignation *ad remanentiam*, we have seen, is to transfer the *dominium utile* into the superior's hands, and leave it there permanently. That which we have now to consider differs, inasmuch as the surrender is made, not to remain with the superior, but in order to his issuing the grant anew to the disponent, if the resignation has been made for his own behoof, (as, when the investiture is renewed to a particular series of heirs,) or in favour of a disponent. It is, therefore, called, for distinction's sake, RESIGNATION *in favorem*. Here, while the ceremony was retained, the superior, after receiving the symbolical baton, delivered it either back to the vassal, if the resignation was in favour of himself, or to the third party in whose favour the surrender was made; whereupon the resignatory took instruments in the hands of a notary public, and a formal instrument was extended. This proceeding had no effect in transferring the *dominium* to the superior. In his hands it was, according to Craig, a *fideicommissarium feudum*, subject to the condition and quality that he should reissue it to another; and it is well-established law, that the feudal estate does not pass into the superior's person by the act of resignation, but remains vested in the disponent, until he is divested by the disponent's sasine. Instruments of resignation *in favorem* have not been commonly used for a long period, and they are now abolished by the Infestment Act,

COMPLETION OF
TITLE BY RESIG-
NATION *in favo-*
rem.

INSTRUMENT OF
RESIGNATION *in*
favorem ABOL-
ISHED.

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11 D. 37;
2 Ross, L. C.
146.

CEREMONY OF
RESIGNATION
ABOLISHED IN
CROWN RIGHTS.

8 & 9 Vict. cap. 35, § 9, as wholly unnecessary. It is now settled by *Renton v. Anstruther*, 14th November 1848, that, in titles expedite before the Infestment Act, it was not necessary to prepare or extend instruments of resignation *in favorem*—not even in the case of the death of the granter or grantee of the procuratory in which the resignation is made—although it has sometimes been supposed, that in this particular case the terms of the Statute 1693, cap. 35, rendered it necessary that an instrument of resignation should be expedite. The ceremony is also abolished in Crown rights by the seventeenth section of the Crown Charters Act, 10 & 11 Vict. cap. 51. In rights held of subject superiors, there is no express abolition of the ceremony, but it has been long in non-observance. Practically, the resignation is made, and its purpose effected, by applying to the superior for a charter, and obtaining it. We shall now therefore consider

DISTINCTION BE-
TWEEN ORIGI-
NAL CHARTER
AND CHARTERS
BY PROGRESS.

The Charter of Resignation.—This, and the charter of confirmation, are called charters by progress, because used to renew a right previously granted, in contradistinction to the charter by which a right is created, and which is, therefore, called the original charter. The original charter, being in its nature a contract, is onerous in the highest degree. The charter by progress is a renewal of the grant, made at the request of the receiver, and, where errors occur in it, they may be corrected by reference to the disposition which forms its warrant. An erroneous destination was thus corrected, in *Drummond v. Drummond*, 27th February 1761, adhered to and affirmed in *Drummond v. Drummond*, 17th May 1793. When we come afterwards to treat generally of the entry by the superior, we shall find, that any purchaser, holding a procuratory of resignation from the last entered vassal, is entitled to compel the superior by personal diligence to receive him and grant new infestment. That is done by granting a charter of resignation. Its clauses are:—

M. 6934.
M. 6936.

1. INDUCTIVE
CLAUSE.

1. *The inductive clause*, setting forth the consideration, which is the composition paid for the entry.

2. DISPOSITIVE.

2. *The dispositive clause*, whereby the superior “*gives, grants, and disposes*,”—the two first words distinguishing this conveyance from that upon a sale, where the granter “*sells, alienates, and disposes*.” He also “*perpetually confirms*” the feu to the grantee. This term, “*confirms*,” is a ratification of the bestowal already made in the eye of the law by the delivery of the baton in the ceremony of resignation. The conveyance by this clause is as absolute and unqualified, as if the superior were vested with the *plenum dominium*, which is in accordance with the feudal notion that the fee is for the time in his hands by resignation. The *habendum* or destination is in the same terms as in the disposition upon which the charter proceeds.

3. *Quæquidem*.

3. The next clause is *The QUÆQUIDEM clause*. Its office here is to

express the *modus vacandi*, i.e., to shew how it is, and for what purpose, that the fee, having been formerly given out by the superior, is again in his hands. It bears, therefore, that the lands formerly pertained heritably, (i.e., by a completed infeftment,) to the former vassal, (granter of the disposition,) holden by him of the granter of the charter as immediate lawful superior thereof, and were resigned by him, by virtue of the procuratory of resignation contained in a disposition, (which is identified by its date,) granted by him to the disponee, in the hands of the granter of the charter as superior in favour and for new infeftment of the same to be granted to the disponee. This clause is not essential, but its usefulness is obvious in connecting the new investiture with the former one. The next clauses are

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Quæquidem.

4. *The TENENDAS.*

5. *The REDDENDO.*—This will be of the same import as in the original charter, which we shall afterwards see is the *regula regulans*, and controls the charter by progress in the event of any discrepancy appearing, unless it be the result of express agreement. Any omission, also, is supplied by reference to the original right, the whole conditions and qualities of which are presumed to be repeated in those that follow, the rule here being, as Mr. Ross remarks, the converse of that by which last wills are governed.

There is no warrandice in charters by progress, for in these the superior interposes at the request of others, and undertakes, or incurs, no liability by doing so. Next, therefore, we have

6. *The clause of registration*, which, for the reasons already explained, is in the Books of Council and Session only; and

7. *The precept of sasine*, which, as well as the registration clause, may be in the brief terms permitted by the Lands Transference Act; only to the precept will be added a reservation of bygone and current feu-duties in so far as not paid, and the words *salvo jure cujuslibet*, which express, what the absence of warrandice implies, viz., that the superior incurs no liability by granting the charter. If it has been unwarrantably asked for, it is granted *periculo petentis*; and, as regards rights competent to the superior himself, as, for instance, if there should emerge to him a right to the *dominium utile* preferable to that of the party to whom he has granted the charter by progress, the granting of the charter shall not preclude him from vindicating that right, because, as he may be compelled to grant the charter, he ought not to be prejudiced by doing so.

The charter of resignation, being executed and delivered, is a good title against the granter of it and his heirs even without infeftment; *Campbell v. M'Charty*, 23d July 1634. But, as against all other parties, it is an incomplete right. Upon the principle already stated, that the resignation is made upon a condition which is not satisfied, until the new vassal is invested, the feu remains in the resigner, until

CHARTER GOOD
AGAINST THE
GRANTER WITH-
OUT SASINE.

¹ Br. Supp. 86.

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M. 8740.

CHARTER OF
RESIGNATION
GIVES INCOM-
PLETE RIGHT TO
THIRD PARTIES,
TILL SASINE.

the resignatory's right is perfected by sasine, for the resigner cannot be divested except by the investment of the resignatory. This is distinctly shewn by *Grant v. Campbell*, 22d February 1760, where, after the party had taken out a charter of resignation, it was found competent for him, before using the precept in that charter, to infeft himself upon the *de me* precept in his disposition from the resigner, because, no infeftment having followed on the charter, the feudal right was still in the resigner. The completion of the right being thus dependent upon the sasine, it is manifest, that, even when instruments of resignation *in favorem* were used, they constituted merely a personal and incomplete right; and, as they did not require to be registered, they formed no impediment to a second conveyance of the subject, which, if followed by infeftment creating a subfeu, or, if completed by charter and sasine, before the infeftment of the first disponee, defeated his right. The superior, however, was bound by acceptance of the first resignation to infeft the resignatory, and liable in damages if he afterwards accepted a second surrender so as to defeat that obligation. Over-lords receiving double resignations were subjected to severe penalties by 1540, cap. 105; and, no doubt, upon the same principle the superior would still be liable in damages, if, upon being applied to for an entry, he should obstruct the completion of the applicant's title, so as to postpone it to a subsequent claim in competition. The continued efficacy of the original sasine is strikingly shewn by this also, that the casualties of superiority fall due to the superior by the death of the resigner, as long as his disponee's right remains personal; *Purves v. Strachan*, 14th November 1677.

Thomson's
Acts, ii. 375.

M. 6890.

DISPONEE'S
RIGHT COM-
PLETED BY
SASINE.

The right of the disponee is completed by sasine taken and recorded, which may now be done in the form permitted by the recent Infeftment Act. Until infeftment passes, his right under the *a me* mode of transmission, which we are considering, is incomplete, and may be defeated by a subfeu, or a posterior conveyance flowing from his author, and perfected before his. But his infeftment removes that danger, because it divests the disponer, who, accordingly, ceases to be vassal, the disponee being substituted in his room, and holding the lands immediately of the superior himself, and by his own warrant.

COMPLETION OF
DISPONEE'S
RIGHT BY CON-
FIRMATION.

But the disponee in a disposition *a me* may choose to complete his right by CONFIRMATION. Then he will first obtain and record infeftment in his own favour upon the disposition. Now, mark the effect of this sasine. It takes its character from its warrant. That warrant is the disposition, and not the precept of sasine merely. That precept is a mandate to deliver possession. But what kind of possession? To ascertain this, we must see what kind of possession the disponer obliged himself to give, and must, therefore, go to the obligation to infeft. That, in the case under consideration, binds him

to infeft the disponent *a me*—that is, not to hold of himself, but to hold of his superior. Infestment on this disposition, then, cannot create a holding of the disponent, for the warrant does not authorize such a holding. Nor can it make the disponent hold of the superior, because no one can be a vassal without the act of the superior receiving him. Hence it necessarily follows, since the superior cannot be without a vassal, that the disponent continues his vassal undivested, notwithstanding the disponent's sasine, which is, accordingly, exposed to the danger of subsequent conveyance completed before he is received by the superior. The right, then, is completed by the ratification of it expressed in

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The Charter of Confirmation.—This the superior may now be compelled to grant by the sixth section of the Lands Transference Act, which empowers a person infeft upon a disposition with an obligation to infeft *a me* to charge the superior to grant a charter of confirmation, in the same way as he may be charged to grant entry by resignation.

SUPERIOR MAY
BE COMPELLED
TO GRANT CHAR-
TER OF CONFIR-
MATION.

The charter of confirmation is of very ancient origin, and examples of it are contained in the compilation of *Marculfus*. Originally it was sought as an act of prudence on the part of the purchaser, in order to secure to himself the countenance and protection of a powerful over-lord. In the early history of feus also there were other confirmations in use, not of a feudal character. These were such as were obtained from the heirs of the granter, in order to obviate the objections which they might make to the alienation in their character of *hæredes proximi* or *hæredes remotiores*. The over-lord himself being *hæres ultimus*, his confirmation was important in this view also. In process of time the charter of confirmation was sought as a remedy for other evils. Although from an early period subinfeudation was permitted, the subordinate vassal was liable to this hazard, that his possession might be affected by the casualties incurred through the death or delinquency of his immediate superior. The casualty of recognition inferred an entire forfeiture of the feu, whereby the subfeu was annihilated. It became an object, accordingly, to get the sanction of the superior to the subfeu, which obviated this extreme risk, the effect of the immediate vassal's forfeiture being, that the subvassal who had been approved by the superior was brought forward, and put in his place. This, however, might also be disadvantageous, as, for instance, when the subaltern right was blench, the subfeuar, on rising to his author's place, became necessarily liable in the full services, however onerous or expensive these might be. Mr. Ross, in opposition to other authorities, maintains the genuineness of the statute of Robert I., said to have been passed in 1325 in order to prevent subinfeudation, and to make all lands hold immediately of the capital lords, and he conjectures with considerable probability, that

HISTORY OF
CHARTER OF
CONFIRMATION.

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that Act is the foundation of our conveyances with the holding *a me de superiore meo*, although it ultimately failed in giving to these conveyances the efficacy of complete rights independently of the superior's sanction. It is certain, however, that, since the beginning of the fifteenth century, the conveyance *a me* with *sasine* following has been ineffectual to divest the vassal, without the superior's confirmation. Here the confirmation is different in its purpose and effect from that which was taken as a protection to the subfeu. The confirmation of the *a me* holding dissolves the superior's relation to the former vassal, and establishes the new vassal in the full right and place of the other. Thus, before confirmation, the disposition and *sasine a me* are defeasible. After confirmation, they constitute a complete right. In the English phrase a voidable estate is rendered not voidable.

OLD FORM OF
CHARTER OF
CONFIRMATION.

The structure of the charter of confirmation is simple. By the forms observed before the recent statute, after acknowledging receipt of the composition, there was

CLAUSE OF CONFIRMATION.

1. *The clause of confirmation*, whereby the grantor ratified, approved, and perpetually confirmed to the grantee, and his heirs, and assignees, the disposition in his favour, (identified by the name of the disposer, and its date,) and the recital of which contained a description of the lands; and the *sasine* also was confirmed and identified by the name of the notary, its date, and the date and place of recording. Here, the name of the last entered vassal was not directly specified, but the clause had the same effect as the *quæquidem*, because the effect of the charter depended upon its confirming all the transmissions since the last entry; and it necessarily, therefore, commenced with the right granted by the last entered vassal.

CLAUSE OF
DISPENSATION.

2. At a remote period it was customary to engross *verbatim* in this charter the writs which it confirmed. The next clause dispensed with that insertion, and it also declared the confirmation to be as effectual as if it had been granted before the infeftment was taken. This declaration will presently claim our particular attention. There followed—

3. *The TENENDAS.*

4. *The REDDENDO.*

Neither of these clauses was essential. Reference might be made for the duties to the original grant, and such reference was implied.

5. *The registration clause.*

6. *The testing clause.*

There is no precept of *sasine*, a point in which this charter differs from all others.

NEW FORM OF
CHARTER OF
CONFIRMATION.

The form of this charter is materially altered by the Lands Transference Act. By the style contained in schedule D subjoined to the Act, the superior simply confirms to the grantee the lands, which are

described, and the sasine in the grantee's favour, which is identified by specifying the register, and date of recording, with a brief statement of the holding and *reddendo*, consent to registration, and testing clause. There is here no mention of the disposition upon which the grantee was infeft, and, by section 7 of the Act, it is declared, that, when a superior confirms the lands and the sasine in favour of the receiver of the entry, the charter may be in the form of the schedule, and, in whatever habile form expressed, shall be held to confirm to him, as regards the lands expressed, the whole dispositions and instruments of sasine, and all other deeds, instruments, and writings, necessary to be confirmed in order to complete his investiture as immediate vassal, although such deeds, instruments; and writings, are not enumerated in the charter.

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The form adopted in the Statute is an abbreviation of that given in the Juridical Styles, with the exception, that, although the last vassal be not named, or any of the intermediate transmissions specified, or even that in favour of the grantee, yet the confirmation of the sasine of the latter, along with the lands, is an effectual confirmation of all the intermediate deeds and instruments. This change is the more remarkable on account of the question agitated among Lawyers, whether confirmation of the disposition from the last entered vassal be sufficient without special confirmation of the sasine following upon it. It appears singular, that any doubt should have arisen upon this question, when we refer to the opinions of Institutional writers. Lord STAIR says,—“If sasine have not been taken till after the confirmation, the date of the sasine is the rule;” and Mr. Erskine delivers the same doctrine. The doubt appears to have originated in observations made by Lord President BLAIR in the case of *Adam v. Drummond*, 12th June 1810, where he remarked, that he had always held confirmation to be necessary after the sasine, and referred to the Act 16 Geo. II. cap. 11, § 10, which provided, that no singular successor should be enrolled as a frecholder until he was publicly infeft, and his sasine registered, or charter of confirmation expedite, where confirmation was necessary, one year before enrolment. This, however, does not appear to touch the question. In the same case, it was held by Lord ARMADALE, an eminent feudal lawyer, that confirmation of a precept *a me*, and of the sasine to be taken on it by a person named, would suffice. Mr. Ross treats the objection as absurd, pointing out, that the practice of first taking sasine arose after the introduction of the double manner of holding in the same right in order to divest the seller of completing the right *de me*, and that there is, in reality, an incongruity in taking sasine upon a precept *a me*, which is inoperative until confirmed; and Sir Thomas Craig shews, that the violation of principle involved in such infeftments before confirmation was the origin of that part of the clause of dispensation invariably inserted in this charter before

I. p. 563, 3d Edition.

CONFIRMATION
OF DISPOSITION
BEFORE SASINE.

IV. 35, 11, and
Appendix, § 2.
Inst. ii. 3, 42.

ii. 296.

- PART III.** the introduction of the new forms, which declares it to be as valid and sufficient, as if the present confirmation had been made and granted before the taking of the said infeftment. Upon the same views, Mr. Bell in his treatise on the Election Laws holds, that, the earlier the superior's consent is adhibited, the more legal and effectual must the transaction be. To these authorities may be added the observation of Lord MEADOWBANK in the case of *Kibble v. Stewart*, 16th June 1814, where he refers to confirmation before infeftment having once been practised, and adds, though not with great confidence, that this, "perhaps, might be done yet." The practice of taking infeftment before confirmation, will, no doubt, continue to be universal under the new enactment, which makes confirmation of the grantee's sasine confirm all the intermediate titles since the last entry. But it is right that the practitioner should be aware of the existence of this question, and conversant with the principles upon which its decision must depend.
- CHAPTER III.**
- p. 242.
- F. C.
- Supra*, p. 603.
- THE SASINE MUST BE IDENTIFIED IN THE CHARTER.**
- 16 D. 37.
- EFFECT OF CONFIRMATION.**
ii. 259.
- IT OPERATES *retro*.**
- M. 8807; 2
Ross, L. C. 127.
- 16 S. 76; 2
Ross, L. C. 129.
- The decision upon another point in the case of *Adam* points out what was essential, and is now, if possible, more necessary than ever, viz, that the sasine must be infallibly specified in the charter. In that case vitiation in narrating the date of the sasine was not allowed to annul the charter, because the sasine was found to be otherwise sufficiently identified, and the vitiated date was held *pro non scripto*. In the case also of *Borthwick v. Glassford*, 15th November 1853, erasures in the narrative of a charter of confirmation in reciting the resolute clause of an entail was held not to vitiate. But, when the whole warrants and sasines were set forth, it is easy to see that the means of identification might be more ample, than when the description is limited to the last instrument.
- Formerly, the confirmation used to be indorsed upon the disposition, but, since it was made liable to stamp-duty, it forms a separate writ.
- With regard to the effect of the *a me* title, Mr. Ross holds, that infeftment *a me* before confirmation is a title of possession, and affords action of mails and duties against tenants. When confirmation is obtained, it operates *retro*, validating the infeftment from its date, and the superior is, therefore, excluded from demanding casualties which may have fallen due between the date of the sasine and the confirmation, although before confirming he could have claimed these. This forms a marked distinction between this and the charter of resignation, the granting of which does not exclude the superior from casualties which shall emerge before sasine follows upon it. The rule that confirmation operates *retro* prevails to the extent of validating titles in favour of a party who has died before the confirmation; *Macdowall & Houstoun v. Hamilton*, 19th January 1793; and the case of *Lockhart v. Ferrier*, 16th November 1837, is a strong authority to the same effect. There a party infeft *a me*, but not confirmed, having

granted precepts of *clare constat*, upon which the receivers of them were infeft, the whole of these titles were found to be validated by confirmation obtained after the death of all the parties. The rule, however, is subject to this condition, that there shall be no mid-impediment—that is, no right to the property completed in favour of another person before the date of the confirmation. Thus, if the vassal (who is not divested until the purchaser is confirmed) shall grant a base right or an *a me* right, and these be completed by infeftment and confirmation respectively, before the purchaser is confirmed, these are mid-impediments which prevent the retroactive effect of the confirmation, and are, therefore, preferable to the purchaser's right. When the mid-impediment is a base right, the effect of subsequent confirmation in favour of the purchaser is to vest in him the mid-superiority of that base right, since it was holden of the former vassal, in whose place he is now substituted. It is, of course, only completed rights, that form mid-impediments, and a disposition *de me* or a disposition and infeftment *a me*, not followed by infeftment or confirmation, can have no effect to obstruct the retrospective influence of the purchaser's confirmation. On the other hand, the retroactive effect of confirmation is absolute, if there be no mid-impediment; and it cannot be controlled or restricted, so as to validate one sasine and leave another unaffected. A party, therefore, cannot confirm his author's right to the limited effect of validating his own sasine and leaving a prior one invalidated. The confirmation necessarily accresces to every prior infeftment flowing from the author whose sasine is confirmed; *Campbell v. Lady Kilchattan*, 15th January 1663. We shall afterwards

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CHAPTER III.
CONFIRMATION
DOES NOT OPER-
ATE *retro*,
WHERE MID-
IMPEDIMENT.

Hope's Minor
Practicks;
Title v; § 4.

M. 1302.

By 1578, cap. 66, it was enacted, that in competitions among Crown vassals upon different confirmations of the same subject, the first confirmation should prevail, and that the last confirmation should not be respected, although confirming the first infeftment. Competitions among the vassals of subject superiors are determined by the same rule, the infeftment first confirmed being preferred to an earlier infeftment, of which the confirmation is later.

CRITERION OF
PREFERENCE
BETWEEN COM-
PETING CONFIR-
MATIONS.

Ersk. Inst. iii.
3, 14.

The confirmation of a sub-feu is not now of common occurrence. Where it does take place, it cannot make the sub-feuar hold of the superior, because there is no warrant from the vassal to substitute the sub-vassal in his place. The effect of confirming a sub-feu was to exempt the sub-vassal from the casualties which annihilated the feu by forfeiture on the part of the vassal.

CONFIRMATION
OF SUB-FEU.

The effect of the reservation, *salvo jure cujuslibet*, is shewn in *Lord Forbes v. Garrioch*, 28th November 1673, where, the superior having granted confirmation, he was found not to be thereby pre-cluded from the benefit of inhibition affecting the property, which he

CLAUSE *salvo
jure cujuslibet*.
M. 6517.

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had previously used. In order to exclude all question or allegation of *mala fides*, it may be prudent in such circumstances to make an express reservation of any right competent to the superior.

SUB-FEUDS BEFORE REGISTRATION WAS INTRODUCED.

Transmission DE ME.—We have thus inquired how a feu may be transferred by a public right—*i.e.*, a conveyance substituting the acquirer in the place of the vassal, so as to hold of the superior; and we are now to examine the mode of transmission by subinfeudation, or a private holding. It has already been seen that base or private rights were known and favoured at an early period. These conveyances, however, were attended with great danger. Before the establishment of the registers for publication, they might be kept secret from all but those interested; and a way was thus opened to the fraudulent practice of first selling for a valuable consideration, and afterwards granting a base right to a connexion or friend, falsely dated prior to the sale, in order to defraud the purchaser. This practice was the origin, and forms the preamble, of the Act 1540, cap. 105, which enacted, that possession for year and day by one who had acquired the lands should be preferred to the title, although prior in date, of one who had privately been put *in state* (*i.e.*, who had got a *de me* conveyance) of the same lands. It was, therefore, only such private rights as were kept secret that were struck at by this Statute, and it did not impeach titles obtained by a *de me* holding, provided these were followed by possession. This Statute remained in force after the Act 1617 establishing the registers, but so far modified in its application that very slight acts of possession were sustained as sufficient. It was evidently, however, an unsatisfactory condition of the rights of property, when the purchaser's security was dependent, not upon a clear and infallible criterion, but upon acts of possession, which were necessarily susceptible of doubt and uncertainty in their construction. A complete remedy was provided by the Act 1693, cap. 13, which, as we have already seen, established the preference of rights according to the priority of registration of the sasines, "without respect to the distinction of base and public infeftments, or of being clad with possession, or not clad with possession."

1693, c. 13, MAKES PRIORITY OF REGISTRATION OF SASINE THE CRITERION OF PREFERENCE.

EFFECT OF TRANSMISSION *de me*.

The base right or transmission *de me* differs from the conveyance *a me* in this, that it creates a new feudal dependency. By the public conveyance there is a change of vassals, the purchaser being substituted in place of the last-entered vassal. But the base right makes no change of vassals, for the disponent continues to hold of his superior. It creates a subvassalage, investing the disponent with the character of superior to his disponent. The *a me* conveyance divests the disponent entirely. The *de me* conveyance divests him only of the *dominium utile*, which passes to the subvassal. There still remains in

him an estate, which, in relation to the subvassal, is that of superiority, but, in relation to his own superior, retains all the characteristics, and is subject to all the liabilities, of a *dominium utile*. The difference in the effects of these modes of transmission is clearly determined upon feudal principles by the specific diversity of their character. In the *a me* conveyance the disponent says, "I dispo to you to hold of my superior;" so, as the superior must have a vassal, there is no effectual transmission, until the disponent becomes vassal by an infeftment either bestowed or confirmed by the superior. In the conveyance *de me*, again, the disponent says, "I dispo to you to hold of myself;" and, the moment infeftment passes upon the disponent's own warrant to that effect, the disponent is the entered vassal of the disponent, who is thus, therefore, divested of the *dominium utile*. The disposition *a me* with infeftment does not transmit the property until made public by resignation or confirmation; the disposition *de me* with infeftment transmits it at once.

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CHAPTER III.
DIFFERENCE IN
EFFECT BE-
TWEEN DISPO-
SITION *a me* AND
DISPOSITION *de me*.

It is unnecessary to say anything of the form of the disposition *de me*. That were simply to recapitulate the clauses of the original charter. The charter is the proper name of this deed, as it creates a new feu. It is familiarly called the feu-charter, and also feu-disposition. Its purpose is also effected by the feu-contract, which is a bilateral deed, and differs from the charter in this, that while in the latter the vassal's obligations are implied from his receiving and acting upon the right, in the feu-contract he expressly binds himself to pay the feu-duties and casualties, and to perform the other engagements incumbent upon him. In feus made for the purpose of building, where the security for the feu-duty is to consist chiefly of the erection, the contract is useful both in affording a ready *compulsitor* to enforce the erection, and also in giving immediate recourse against the vassal's person and effects for payment of the feu-duties and casualties.* It is unnecessary to recount the clauses of the feu-contract; examples will be found in the Style Book.

FORM OF DISPO-
SITION *de me*.

THE FEU-CON-
TRACT.

ADVANTAGES
OF FEU-CON-
TRACT.

In order to create a base fee the essential thing is, that the conveyance bear that it is to be holden of the granter. In a recent case, a conveyance containing a clause in the form of the *quæquidem*, which is appropriate to a renewed grant, was objected to as not forming an effectual sub-feu, but, as it contained an express declaration that it was to be holden of the granter, with sufficient dispositive words and a precept of sasine, the Court sustained it as a valid transference by a base right; *Sinclair v. Traill & Co.*, 17th July 1847. Transmissible heritable rights not of land may be conveyed in this manner, of which we have an example in the office of heritable usher to the Queen; *Stewart v. Campbell*, 17th January 1782. This office had previously been decided to be a patrimonial subject capable of voluntary or

ESSENTIALS OF
BASE FEE.

HERITABLE
OFFICES MAY BE
TRANSMITTED
BY BASE RIGHT.
M. 6925.

* See *supra*, p. 531 note, and p. 573.

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CONVEYANCE
de me COM-
PLETED BY
SASINE.

judicial transmission, and, being thus *in commercio*, the Court held it to be transmissible by base infestment.

The conveyance *de me*, whether in the form of a charter, or disposition, or contract, is completed by instrument of sasine, which, when recorded, has the effect instantly to divest the granter of the *dominium utile*, and transfer it to the grantee.

DISADVANTAGES OF A ME
CONVEYANCE.

Transmission A ME vel DE ME.—It is necessary to bear in mind the disadvantages attaching to each of the modes of transmission which we have examined, in order duly to appreciate the expedient by which they were combined, the inconveniences of each avoided, and its benefits secured. The *a me* conveyance could not be completed without the superior's assistance, and for that it was necessary to pay the composition immediately, although it would not otherwise become due, until the death of the last-entered vassal. Again, an entry from the superior might not be easily or soon got in the event of his absence, of his being minor without guardians, or of the right to the superiority being under litigation. It is true, that there was a legal remedy by charging the superior, and upon his failure going to the over-lord, but this remedy did not reach every case, as, for instance, where the superior was a peer, he was exempt from diligence, and, even when available, it involved expense and delay, and the charges of an entry with the Crown, if it should be necessary to go to the paramount lord, were very costly. In the meanwhile the purchaser's right was exposed to the hazard of being defeated by subsequent base infestments obtained before the completion of his title.

DISADVANTAGES OF DE ME
CONVEYANCE.

On the other hand, while the *de me* transmission conferred the benefit of an immediate divestiture of the disponent, the sub-vassal was liable, as we have seen, to the casualties incurred by the death or delinquency of his author, and, although he might obtain confirmation of his base right, that secured him only against such of the casualties as exhausted the property, and he still continued liable to those which consist in a temporary right to the rents.

THESE DISADVANTAGES
ORIGINALLY
REMEDIED BY
TWO CHARTERS.

The method originally taken to obviate these disadvantages as far as possible was, that the seller executed two distinct charters in favour of the purchaser with different tenures. The one was to authorize a holding *de se*, and for that purpose it contained a precept of sasine; while the other was to give a holding *a se de superiore suo*, and contained a procuratory for effectuating that by resignation, and also a precept of sasine to enable the disponent, if he chose, to make his right public by confirmation. In these two charters the purchaser obtained the means of combining the advantages of every mode of transmission; for, by taking infestment upon the charter *de me*, he could immediately divest the seller of the *dominium utile*, whereby his purchase

was substantially secured, and the charter *a me* enabled him, at any time when it might be convenient and attainable, to convert the base into a public right. In the meantime, that he might possess under the base right without hazard or expense, it was made a complete feudal contract by the stipulation of an elusory blench-duty payable to the seller, if asked only, and the seller discharged the casualties, and engaged to enter heirs and disponees for a nominal sum. The purchaser, on the other hand, obliged himself to enter with the superior as soon as it could be effected, and in the meantime to relieve the seller of the duties and services.

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The Act of 1469 compelling superiors to enter creditors, by providing in its liberal construction an increased facility to transmission, led to the disuse of the two charters, (an obligation to grant them if required being substituted,) and this effect was confirmed by the stability imparted to land-rights at the establishment of the registers. But it was customary for some time to follow what was in effect the same method, by taking a disposition *de me* with a view to immediate sasine, and a separate procuratory to effect afterwards a public holding by resignation. Here, there was still the disadvantage of separate writs, which was so severely felt, that a statute was required to obviate the loss of separate procuratories as well as precepts.

THE USE OF
TWO CHARTERS
DISUSED AFTER
1469.

Eventually all these difficulties found a happy solution by the combination in one deed of the essential parts of the different charters, so as to obtain from their union the same effects and advantages previously derived from them in a separate form. It was in this way that the modern disposition attained the shape which it still substantially retains. We have seen how remote are the sources from which it dates its origin, and how various the elements from which it has been compounded. The manner in which it produces effects so diversified as those to which we have referred, will best appear in an examination of its clauses, which the importance of this deed, as by far the most frequent instrument in the transmission of lands, requires that we should do somewhat in detail.

THE TWO SEPA-
RATE DEEDS
COMBINED IN
ONE.

Disposition with double manner of holding.—The clauses, taken in the order of the new form, are

1. The inductive, containing the consideration, &c.
2. The dispositive clause.
3. The term of entry.
4. The obligation to infeft.
5. The clause for resigning.
6. The assignation of writs.
7. The assignation of rents.
8. Relief of feu-duties and public burdens.

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9. The clause of warrandice.
10. The registration clause.
11. The precept of sasine.
12. The testing clause.

We shall examine these in their order, with a constant reference to the previous form, between which and the present there is little difference as regards their effects, notwithstanding the marked change in their proportions.

See *supra*, p.
512.

(1.) *The Inductive Clause.*—On this there is nothing to be added to the remarks submitted upon the narrative clause of the charter, which are all applicable to the disposition. When there is an uncertainty in the title, the concurrence of all believed to have any claim ought to be required. The price must be fully set forth in compliance with the Stamp Acts, and the discharge of it is full evidence of payment, there being no need of a separate receipt as in England. The granter being, as we assume, infeft, he is styled heritable proprietor of the subjects disposed.

Ersk. Inst. ii.
3, 22.

DESCRIPTION OF
SUBJECTS.

(2.) *The Descriptive Clause.*—The operative words are, as in the charter, “*sell, alienate, and dispose,*” but without the terms, “*in feu-farm,*” which are only used when the tenure is to be limited to a base or *de me* holding. The description of the subject will be taken from the charter. If a portion only is to be conveyed, great care must be taken to describe accurately its extent; and, as a general rule, the correspondence between the description and the lands as possessed, or as answering to the terms of the description, should be ascertained. We had formerly occasion to refer to *Livingstone v. Clark*, 31st May 1821, as illustrative of the evils of inaccurate description, a large proportion of one of two contiguous estates having been found not to have been effectually conveyed to the purchaser of it, but to be feudally vested in the purchaser of the other, through inaccuracy in the description. All errors in the description are of course to be carefully avoided, but they do not vitiate, if other parts of it determine the subject sold. So, in an anonymous case “*Anent seasines,*” 16th June 1670, the objection was disregarded, that the lands were said to be in the sheriffdom of Wigtown instead of Dumfries-shire, there being enough otherwise to identify the property. The case has already been cited of *Malcolm v. Campbell*, 7th July 1849, to shew that discrepancies of orthography are not material, unless they involve reasonable doubt.

1 S. 44.

2 Br. Supp. 466.

11 D. 1261.

After the description there is added, “*together with all right, title, and interest, which I, or my predecessors and authors, had, have, or can any way claim or pretend thereto in all time coming.*” As the words of disposition and description effect the transmission, these words are not essential, but they are in universal use, and are expressive of what the law decrees without them, viz., that, when lands are

sold for an onerous consideration, the conveyance carries with it every right present and future available to the disponent.

The effect of the dispositive clause, if it is not qualified or burdened with reservations, is to give the disponent right to the land, and all that it contains. If the lands are, by the original grant, subject to burdens, which have already entered the record, it is not necessary to insert these, even although appointed to be fully inserted in the investitures, and they will remain equally effectual, if referred to, in the terms prescribed by schedule C subjoined to the Lands Transference Act, as already set forth at full length in the recorded instrument of sasine or of resignation *ad remanentiam* wherein they were first inserted, or in any subsequent recorded sasine; and the 5th section provides, that such reference shall be equivalent to full insertion, and have the same legal effect. The schedule contains also a form for referring shortly to the burdens in subsequent clauses.

3. *Term of Entry*.—This will be determined by the agreement of parties as to the date from which the disponent is to have right to the rents, agreeably to the rules which will be explained under the clause of assignation of rents. The next clause is

4. *The Obligation to Infest*.—This is the distinguishing feature of this form of the disposition, and, in order to appreciate its import, it is necessary that we look at the old form, which bore:—“*In which lands I bind myself to infest the said A. and his foresaids upon their own charges and expenses,*” (without these words it was formerly held, that the disponent was bound to pay the expense of infesting the disponent, but by this form and long-settled universal practice he is not liable for any part of the disponent’s title except the disposition, the expense of which he defrays, if it is not otherwise stipulated;) “*and that by two several infestments and manners of holding, one thereof to be holden of me and my foresaids in free blench for payment of a penny Scots in name of blench farm at Whitsunday yearly upon the ground of the said lands, if asked only, and freeing and relieving us of all feu duties and other duties and services exigible out of the said lands by our immediate superiors.*” This is the *de me* holding for the purpose of instantly divesting the disponent by a base infestment; and in every part it evinces its purpose as merely elusory, in order to effectuate a subordinate holding without creating any substantial estate of superiority in the disponent. The annual duty is the smallest coin, and that payable nowhere but upon the lands, and there, only if asked for,—the disponent undertaking at the same time the whole duties and services exigible by the disponent’s superior. The clause proceeds:—“*And the other of the said infestments to be holden from me and my foresaids of and under our immediate lawful superiors, in the same manner that I, my predecessors, and authors, held, hold, or might have holden the same, and that either by resignation, or*

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EFFECT OF DIS-
POSITIVE
CLAUSE.REFERENCE TO
BURDENS.OLD FORM OF
THIS CLAUSE.

PART III. "confirmation, or both, the one without prejudice of the other." This
CHAPTER III. is the infestment *a me de superiore meo*, to be completed either by
resignation, or by confirmation, or by both, the forms being capable
of combination, as we shall afterwards see.

NEW FORM. The new form is:—"I oblige myself to infest the said A. and his
"foresaids to be holden A ME VEL DE ME;" and these words, by § 2,
imply an obligation to the same effect as the former clause which
we have just read.

MANNER OF HOLDING IMPER-
FECTLY SPECI-
FIED, OR OMIT-
TED. The vital importance of these brief words is evident from the
effects, which would result from the absence of the whole or any of
them. If the obligation to infest were general without specifying the
manner of the holding, then sasine following would not divest the dis-
poner without an entry from the superior, because, as it is expressed
in the report of the case of *Buchan v. Jamieson*, 18th July 1678, a
general obligation without specifying the manner of holding imports
"a public infestment, a base not securing against feudal delicts and
"the mediate superior." The result is the same, if the holding *de*
me is not distinctly expressed, but left to inference or conjecture;
M. 2258. *Peebles v. Watson*, 9th December 1825. Here, the obligation was to
infest the disponee "by two infestments and manners of holding, and
4 S. 290. "that either by resignation, or confirmation, or both, the one without
"prejudice of the other"—a form which shews entire ignorance of
the import of the terms used. The security constituted by the deed
was, accordingly, reduced because there was no obligation to infest
de me, and the sasine was ineffectual for want of confirmation. If
again, the words "*a me*" should be omitted, and "*de me*" alone
inserted, the result would necessarily be a base infestment holding
permanently of the disponer, and not affording a medium for connect-
ing the disponee with the superior, unless the deed should also
contain a procuratory of resignation.

This clause thus contains an obligation to grant two infestments,
the one base of the granter, the other public by entry with the supe-
rior. The manner in which these become available to perfect the
disponer's right will be shewn, after we have completed the examina-
tion of the deed.

5. *The Procuratory of Resignation.*—The purpose of this clause is
stated in its introductory words, "*for completing the said infest-*
"*ment by resignation*"—that is, fulfilling the second part of the
obligation to grant a public infestment, which alone is capable of
completion in that form. The clause, according to both the old style
and the new, is the same as in the disposition *a me*, and it is unneces-
sary to examine it again.

See *supra*, p.
591.

6. *The Assignment of Writs.*—In the charter this clause was limited
to the effect of producing a sufficient progress to maintain the grantee
in the feu. When the acquirer is to be substituted in the disponer's

place, the transference of the title-deeds is absolute. The words of the new form will accordingly be used, importing, according to § 3, an absolute and unconditional assignation to the writs and evidents.

The doctrine delivered by Mr. Ross, that "a disposition to the lands carries the real title, but does not carry the personal rights relating to it," does not appear to be consistent with legal principle or with the authorities. The rule in regard to accessory rights certainly connects every title in the granter with the conveyance of his real right; and, in the case of *Erskine v. Hamilton*, 19th December 1710, an M. 6319. infetment of annual-rent with procuratory and assignation to maills and duties, granted by one whose only title was a disposition to an apprising, was found to be an implied conveyance of that disposition, so as to exclude a posterior formal conveyance of it.

The assignation, however, ought never to be omitted. But attention is required to its effect. Rights necessarily attaching to the lands are transmitted along with them, and so obligations of warrandice pass by the general assignation of writs without any specific conveyance, contrary to the opinion of Stair, whose doctrine is corrected by Erskine. But rights which do not necessarily adhere to that which is conveyed do not transmit by the general clause. Thus, an assignation of writs, mentioning generally tacks relating to the teinds of the lands conveyed, was held not to give right to a tack of the teinds, under which the disponent possessed them, but which was not specially assigned, the general assignation being held to be only a conveyance in aid of the disposition of the lands; *Grahame v. Don*, 15th December 1814. An obligation to relieve of stipend and augmentations is not transmitted by a general assignment of writs and evidents. That is a separable right and does not run along with the lands, like warrandice of the title. A donee, therefore, cannot claim under it, unless it be specially conveyed; *Horne v. Breadalbane's Trustees*, 23d January 1841; reversed 21st February 1842; and the heir also pleading upon this obligation, especially at a distance of time, will be held bound strictly to prove his right to it; *Sinclair v. Marquis of Breadalbane*, 16th January 1844; reversed 14th August 1846. Difficulties having been felt on the Bench and at the Bar with respect to the nature of the title, which, in accordance with these decisions, is requisite to transmit the obligation of relief of stipend, argument was ordered upon that point in *Spottiswoods v. Seymer*, 2d March 1853. It was there held, that the right does not pass without service or special assignation. Therefore, the eldest son of the receiver of the obligation of relief having made up his title by charter and sasine upon his father's resignation, that was held to be a title to the lands only, and not to the right of relief, which remained in *hereditate jacente* of the receiver, and did not pass to his son's singular successor. The right was also decided not to have

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IS AN ASSIGNATION OF WRITS IMPLIED?
ii. 238.

EFFECT OF ASSIGNATION OF WRITS.

ii. 3, 46.

Inst. ii. 3, 31.

F. C.; 1 Ross, L. C. 50.

IT DOES NOT TRANSMIT OBLIGATION TO RELIEVE OF STIPEND.

3 D. 435;
1 Ross, L. C. 55;
1 Bell's App. 1.

6 D. 378;
1 Ross, L. C. 70;
5 Bell's App. 353.

15 D. 458.

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passed here by the assignation of writs, not being a clause of war-
randice, but an obligation of relief.

The new form of the clause bears, that the writs are not only as-
signed, but delivered conform to inventory. It is of great importance
to have accurate inventories, and these are now of the more value,
since the Lands Transference Act has dispensed with deduction of
the titles by enumeration in charters of confirmation.

Ross, ii. 236.

7. *The Assignation of Rents*.—In old titles and in others of compa-
ratively recent date, this clause assigns the farms, maills, and duties ;
and the process by which an heritable creditor takes possession so as
to levy the rents, is still called the action of maills and duties.
“*Farms*,” as used here, signified originally that portion of the feu-
duty or rent which consisted in produce of the lands for the diet of
the superior’s family. “*Maills*” expressed the money rent, being a
word of French extraction signifying a silver coin, afterwards with
us a halfpenny. “*Duties*” was descriptive of the personal services
prescribed in agricultural tenures, as ploughing, and carriages. Cer-
tain returns are also called “*kain*,” because payable to the chief of
the feu. Every disposition necessarily carries right to the maills and
duties, whether they are expressly assigned or not. One use of the
clause is to settle the term of entry, should that not be otherwise
fixed. In *Caldwell v. Stirk*, 17th July 1629, the conveyance having
been executed a few days before the term of Martinmas without men-
tioning the term of entry, the disponent was held to be denuded by
granting a deed before the term, and the purchaser, therefore, entitled
to the current rent payable at Martinmas.

M. 15,880.

NEW FORM OF
CLAUSE OF AS-
SIGNATION OF
RENTS,—EF-
FECT OF.

The new abbreviated form requires very careful attention on ac-
count of the effect communicated to it by the third section of the
statute, which bears, that “the clause of assignation of rents, unless
“specially qualified, shall be held to import assignation to the rents to
“become due for the possession following the term of entry according
“to the legal and not the conventional terms, unless in the case of
“forehand rents, in which case it shall be held to import an assigna-
“tion to the rents payable at the conventional terms subsequent to
“the date of entry.” In order to understand this, it is necessary
first to ascertain what is meant by the legal terms. This is explained
by Mr. Erskine. The two terms fixed by usage for the payment of
rents are Whitsunday and Martinmas. At Whitsunday the lands are
presumed to be fully sown, and the first half-year’s rent is payable
then, and the other half at Martinmas, which is after the season of
reaping. These are the legal terms, and, if I buy an estate with
entry at Whitsunday, I acquire right to the one-half of the rents for
the possession of the year then current, viz, the half which will be-
come payable at Martinmas. If my entry is at Martinmas, I have no
right to the rents of the crop for that year, but I am entitled to the

“LEGAL
“TERMS.”
Inst. ii. 9, 64.

whole rents of the next crop payable at Whitsunday and Martinmas of the following year. The meaning of the first part of the enactment, then, which makes the right to the rents depend upon the legal and not upon the conventional terms, is this, that, although by the leases or other conventional arrangement, the rent for the half-year following my entry is not payable at the legal term, but at a postponed term, still that term's rent, whensoever payable, is the first to which I shall have right. Thus, if the term of entry be Whitsunday, but the rents not payable until Candlemas and Lammas of the following year, then the first term's rent leviable by the purchaser is that to become due at Lammas of the ensuing year, because that is the rent for the second half of the year current at entry. This was the rule before the date of the Act, as will be found on referring to *Sheppard v. Watherstone*, 24th March 1817; *Penman and Campbell v. Ker*, 10th June 1828. The only alteration which the Act introduced was that contained in the later part of the explanation of the clause, which prevents the effect of the legal terms when the rents are by agreement payable earlier. In such cases, the purchaser is to have no claim for such rents, though payable before or at the term of his entry. The first rent that he can levy is that payable at the next term after his entry.

5 Dow's App.
278.

6 S. 940.

In this state of the law, it is now more than ever advisable, that the leases should be examined when the purchase is made, and the right to the rents made the subject of express paction, where the operation of the statute would be unsuitable.

8. *Obligation to relieve of feu-duties, casualties, and public burdens.*—This clause, in the previous form, embraced the declaration of the term of the purchaser's entry, which is now removed to the end of the dispositive clause. The effect given to the abbreviated form by the third section is the same as that formerly expressed, viz., that it imports an obligation to relieve of the burdens, &c., due prior to the date of the entry. In the old form the expression was "*at and preceding the term of entry*," which was more correctly expressive of the effect intended to be produced.

9. *The clause of warrandice.*—The third section of the Statute gives to the abbreviated form the combined effect of what was previously expressed in separate clauses, viz., absolute warrandice as regards the lands, and writs, and evidents, and warrandice from fact and deed as regards the rents. It is necessary carefully to note what was remarked when discussing the charter, that these general words have not now, as formerly, a meaning flexible according to the nature of the grant, and that they must, therefore, be either omitted or accompanied by distinct qualification, whenever, from the gratuitous character of the transaction, the imperfection of the titles, or any other cause, the warrandice is to be of a lower degree than absolute.

Supra, p. 531.

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 8 S. 399.
 EXCEPTION OF
 FEU RIGHTS,
 &c., FROM WAR-
 RANDICE.

If there is any part of the lands which it is not intended to warrant, that part should be specially excepted, for the words will be held to apply to all, if not qualified. Of this there is an example in *Ramsay v. Cuninghame*, 26th January 1830. If the seller has granted any feu rights which are comprehended within the description, and to be held of the disponent, such feu rights must be expressly excepted in the clause of warrandice. In like manner also, where the lands are let upon lease, since the right of the tenants will exclude possession by the purchaser, the current tacks also should be excepted from the warrandice; and the mention of them will raise the presumption, that the purchaser was made acquainted with their contents. It is not unusual also to express that he shall be at liberty to challenge and reduce them on any grounds not inferring warrandice against the disponent.

10. *The clause of registration.*—In terms of the schedule, this will be for preservation and execution.

PRECEPT INDE-
 FINITE.

11. *The precept of sasine.*—By the old form the precept of sasine in the charter referred to the manner of holding, but it would have defeated the purpose of the disposition with the double manner of holding to limit the application of its precept to either tenure. Its purpose was to give a sasine attributable to either manner of holding, in order that the infeftment might be ascribed to the obligation *de me*, and so divest the granter before confirmation, and yet not in terms restricted to that manner, but capable of being referred to the *a me* obligation, when confirmation was obtained. This object, in which was centred the peculiar efficacy of the disposition with two manners of holding, was manifestly defeated, if, on the one hand, the precept began, as we learn from Mr. Ross it sometimes did, with the words, “and for expeding the said infeftment by confirmation,” because that indicated a holding *a me* only, and so the granter was not divested until the right was confirmed; and, on the other hand, if the precept bore “to be holden of me,” then the sasine was plainly a base right only, incapable of being made public. These dangers were avoided, and the complex object attained, by couching the precept in terms not referable to either manner more than to the other, so that before confirmation it might be held to be base, and so to have divested the disponent, and yet, after confirmation, in equal consistency with its terms, be deemed public, and so capable of immediate feudal relation to the superior.

It is unnecessary to read the terms of the old precept, which were the same as in the charter, with the omission of the words, “to be holden of me for payment of the feu-duties,” &c. The schedule to the Lands Transference Act has adopted the precept previously authorized by the Infeftment Act, the general terms of which adapt it perfectly to the indefinite holding.

The disposition concludes with

12. *The testing clause.*

This deed contains no *tenendas* or *reddendo*, these clauses being peculiar to rights which flow from the superior.

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Completion of donee's title.—Upon receiving this disposition, the donee can immediately have infeftment passed in his favour. The instrument of sasine, like the precept, is indefinite, bearing no reference to either manner of holding, and the donee is entitled to ascribe it to either tenure. The Court, accordingly, construes it in the manner most beneficial to him, and it is held a sasine *de me*, or base right, denuding the disposer of the *dominium utile*, until the superior's confirmation is obtained, which imparts to it the character of a public right from the date of the sasine. On a point so important, it is interesting, as well as useful, to refer to the early decisions by which this convertible quality of the indefinite infeftment was first recognised and fixed. In *Bishop of Aberdeen v. Viscount Kenmure*, M. 3011; 15th July 1680, the sasine being indefinite, the Lords held, that it was applicable to both tenures, and that the sasine *a se* was perfected from the date of the sasine by the confirmation; but that it would have been otherwise, if taken expressly to hold of the grantee's author or his successors. In *Bothwell v. Deans*, June 1687, a superior confirming an indefinite infeftment was presumed to confirm that held *a me*, and the right being thus made public, the mid-superior (*i.e.* the disposer) was found no longer liable to enter the vassal under the obligation in the disposition. Again, in *Oliphant v. Lindsay*, 25th July 1699, confirmation of the sasine upon an indefinite precept was held to make it public, so that it could not afterwards be ascribed to the *de me* holding. COMPLETION OF TITLE, DIS- POKER BEING PUBLICLY INFEST. 2 ROSS, L. C. 1.

The course of the donee with regard to the completion of his title is thus clear. If he wishes to make his right public at once, he can, without taking infeftment on the disposition, execute the procuratory, and obtain a charter of resignation from the superior, infeftment upon which will divest the disposer entirely, and substitute him in his place. This, however, involves the expense of an entry with the superior, and, if it be desirable to avoid this for the present, he may do so by taking infeftment immediately, whereby he divests the disposer of the *dominium utile*, and he may postpone his entry with the superior, and the expense attendant upon it, until, by the death of the last-entered vassal, these can no longer be avoided. Then, or at any earlier time, his right may be made public by confirmation, a mode which may now, as we have seen, be enforced under the Lands Transference Act. M. 3012. M. 3014.

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A MID-SUPERIORITY EXISTS
BEFORE CONFIRMATION.

The position of matters, however, before the confirmation must be remarked. The disponent's infestment being base, there is a mid-superiority still vested in the disponent. Now, that estate of superiority may be conveyed by the disponent to another, and, if such posterior right be first completed by entry with the over-lord, the original disponent will be prevented from making his infestment public, and holding immediately of the superior. The risk of this is trifling with reference to any pecuniary interest, for the duties of the *de me* holding are for the most part elusory. But it is a mistake not unlikely to happen through inadvertence. It is well, therefore, to know, that it is only alienation to a *bonâ fide* acquirer, that will defeat the disponent's power to vest himself in the mid-superiority. If the heir of the disponent shall make up a title to the mid-superiority, that will not exclude the disponent from it, for the heir is bound by his ancestor's deeds, and so the procuratory and obligation in the disposition are as effectual against him as if granted by himself; *Fullarton v. Hamilton*, 22d November 1833. Here, A sold with procuratory and precept to B, who was infest base. Afterwards, A's heir made up a title to his succession including the subjects sold by a precept of *clare constat* from the over-lord. The note to Lord MONCREIFF's judgment regards this as a pressing forward merely of the right of mid-superiority into the person of the heir, and not creating any impediment to the completion of the disponent's right either by resignation, (the procuratory continuing effectual after the death of the granter by the statutory provision already cited,) or by confirmation. Thus the indefinite precept and obligation for a double manner of holding, though used at first only to create a base right, may be resorted to along with the procuratory of resignation at any distance of time to effectuate a public holding, provided the mid-superiority has not been conveyed to a *bonâ fide* acquirer by a title exclusive of the first disponent's. Of this there is a strong example in *Cheyne v. Smith*, 7th June 1832. Here there had been possession by base infestment upon a disposition with double holdings for more than forty years, when the disponent was called upon to take an entry, not by his author's superior, but by the representative of a party to whom the author had granted a second disposition of the same subject, and who had first executed his procuratory, and obtained a charter of resignation, whereby it was pleaded that the first disponent was excluded. The later disposition, however, was found on examination to contain in its clause of warrantance an exception of the prior right, which was, therefore, held still capable of being used, so as to make the first disponent hold by resignation or confirmation immediately of the common author's superior.

DISPONENT
FUNCTUS BY DIS-
POSITION, AND
HIS HEIR NOT
BOUND TO
ENTER FOR DIS-
PONENT'S RE-
MOOF.

It remains to remark, that although the disponent obliges himself to infest by two manners of holding, that is for the convenience and benefit

12 S. 117;
2 Ross, L. C.
316.

10 S. 622.

of the disponent. In questions with him the granting of the disposition is full implement of the disponent's obligations, the essence of the transmission being, that he shall give to the disponent the means of taking his own place. The disponent's heir, therefore, cannot be required by the disponent to make up a title, in order that the disponent may continue to hold of him. This was tried in *Dundas v. Drummond*, 10th February 1769. Here, there was a disposition with procuratory and indefinite precept, on which the disponent was infeft base, but did not enter with the superior. On the death of the disponent the superior raised an action of declarator of non-entry against the disponent to compel him to enter. In order to escape the expense of entering as a singular successor, the disponent instituted an action against the heir of the disponent to have her ordained to enter, and against the superior to have him compelled to receive her. But the Court held that the heir could not be obliged to enter. This fixes the character of the disposition with double holding, procuratory, and precept, as a final act of transmission with respect to the disponent's engagements to the disponent; and it is thus suggested as an important practical rule for the seller's security, that the disposition should contain all these clauses as means for the completion of the grantee's title. Trouble is thus saved to his heir, for, having sold with procuratory and precept, the heir is not bound to enter, and, if the purchaser fail to enter, then it is not incumbent on the superior to make the disponent's heir a party to the declarator of non-entry. It was so found in *Magistrates of Dundee v. Kid*, 26th June 1829.

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M. 15,035; 2
Ross, L. C. 301.

7 S. 801; 2 Ross,
L. C. 303.

Hitherto we have assumed the disponent to be a vassal infeft upon the charter, and that the disponent proceeds to complete his title. But the superior is not entitled to require an entry to be taken while the fee is full, or he may neglect to exercise his right when it does emerge. Let us now suppose that the disponent does not complete his title, but that, having taken sasine upon the indefinite precept so as to divest the granter of the *dominium utile*, he allows his title to stand upon that base infeftment, and, while it is in that condition, sells to another party. This it is quite competent for him to do, and his disponent may sell to another, and so on without limit. These dispositions, if followed by infeftment, will each in its turn form a new subinfeudation. We are now then to consider the case of transmission, where the disponent is infeft base. He will convey in the same manner as if he were publicly infeft by a disposition containing obligation to infeft *a me* or *de me*, procuratory of resignation, and indefinite precept. How is the new purchaser to complete his title? We must attend to the feudal relations of all the parties. These are the superior, the vassal, the subvassal, and the disponent. Can the title be completed by resignation? The disponent has right by the assigna-

COMPLETION OF
TITLE, DIS-
PONENT BEING
INFEST BASE.

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COMPLETION OF
TITLE, DISPONER
BEING INFEST
BASE:—

tion of writs to the procuratory of resignation granted by the vassal to the subvassal, and that is a good warrant, being granted by a vassal holding immediately of the superior. But if he proceeds thus, what does he resign? Only the estate which remained in the vassal after he was divested of the *dominium utile* by the subvassal's sasine. This, therefore, would be to make up a title only to the mid-superiority, and the property would continue a separate estate. But there is a procuratory in the subvassal's disposition to him. Can he use that? Clearly not, as the title stands. For, as the subvassal did not hold of the superior, he could not authorize resignation, which can only be done by an entered vassal. But that defect will be removed by raising the subvassal into the rank of vassal. Confirmation of the subvassal's sasine makes him hold immediately of the superior, and then his warrant to resign becoming effectual, his disponent's title may be completed by resignation. These effects are both produced by one writ,—the charter of resignation and confirmation, in which the resignation appears first, the *quæquidem* bearing that the lands formerly belonged to the subvassal, holden by him immediately of and under the superior by virtue of the confirmation afterwards inserted. It contains a precept of sasine, infestment upon which completes the disponent's title. The study of this form will materially conduce to an accurate perception of the feudal rules. The main feature is the effect of the latter part in making the subvassal hold of the superior, and so capacitating him to grant a valid warrant for resigning, which receives effect in the first part of the charter.

1. BY CHARTER
OF RESIGNATION
AND CONFIRMA-
TION.

2. BY CHARTER
OF CONFIRMA-
TION ONLY.

But there is another mode of completing this title, simpler in its form, and which, as it is by the operation of the Lands Transference Act more succinct and less expensive, will probably be the most frequent in practice. The disponent of the subvassal takes infestment upon the precept in his disposition, and then obtains a charter of confirmation. By the previous practice every disposition and sasine from the last-entered vassal down to the receiver of the entry was specially narrated and confirmed, the subordinate base fees (of which there are two in the case before us) being thus evacuated, and the last infestment made public. The same effect is now produced by confirming only the last sasine according to the form authorized by the Lands Transference Act.

There are thus two ways to complete the title when the disponent holds base, and these are equally applicable, whatever may be the number of base infestments interposed between the last public infestment and the disponent—the one, by resignation and confirmation, in which the disponent's right is by confirmation made public, so that resignation may effectually be made upon his procuratory—the other by confirmation alone.

We have thus considered three forms of transmission :—(1.) By disposition authorizing a public holding—(2.) By subinfeudation— and (3.) By disposition with double manner of holding. In all these cases it is assumed that the disponent was infeft either by a public or a base right. We shall now inquire, how the transmission is made when the disponent is not infeft.

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It will be found stated by Mr. Erskine that not only complete feudal rights, but incomplete personal ones also, are capable of transmission, as charters or dispositions not perfected by sasine. When by the transference of such rights the acquirer obtains an assignation of the unexecuted warrant of sasine or resignation, he can by the use of that warrant render his right real by infeftment. This right being personal, the proper form of transmission is the assignation ; but the deed employed is known as

CONVEYANCE
OF PERSONAL
RIGHT TO LAND.
ii. 7, 26.

The Disposition and Assignation.—It is so called, because the granter disposes the lands by a dispositive clause, as if he were infeft, besides assigning the warrant which is to enable the donee to obtain infeftment. Disposing words, however, are not essential ; and it is the transference of the warrant, with the expressed design that the assignee shall through it obtain infeftment, that constitutes the essence of this conveyance. Before the end of the 17th century, this mode of conveyance was subject to great inconvenience from the operation of the rule of law by which a mandate falls upon the death of either mandant or mandatory, a rule which prevented the execution of the procuratory of resignation or precept of sasine after the decease of either the granter or grantee. We have elsewhere had occasion to observe that this rule was never with propriety applied to cases in which the mandate was intended to benefit the party receiving it, and no injury could result to the estate or representatives of the granter by the use of his authority after his death. Nevertheless the rule was held inflexible, and was enforced upon the death of the receiver, as well as of the granter—in which event, consequently, no real right could be acquired without judicial proceedings against the heir of the granter, or at the instance of the grantee's heir, in order to have the disponent's representative vested and capacitated to grant a new warrant, or to have one judicially supplied, or, on the other hand, to obtain a new warrant in favour of the grantee's heir. It was to remedy these inconveniences that the Act 1693, cap. 35, was passed, declaring that procuratories of resignation, and precepts of sasine, should continue in force, and be sufficient warrants for resignation and sasine in favour of the grantees, and their heirs, assignees, and successors, having right by general service, disposition and assignation, or adjudication, as well after as before the death of the granters, or parties to whom they are granted, or both. This Statute has always been

DISPOSING
WORDS NOT
ESSENTIAL.

1693, c. 35.

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ASSIGNATION
OF PROCURA-
TORY WITH
PURPOSE TO
TRANSFER, IS
ENOUGH.
16 S. 184; 2
Bell's App.
214; 2 Ross,
L. C. 435.

regarded as one of the most remarkable improvements in the history of conveyancing in Scotland.

A personal right to lands with an unexecuted procuratory of resignation may be effectually transferred by a simple assignation of the procuratory, provided the purpose of the assignation, as intended to transmit the right, and to enable the assignee to obtain infeftment, be explicitly stated; *Renton v. Anstruther*, 5th December 1837, affirmed 18th August 1843. In the report of the appeal will be found the form of an assignation in the most simple terms, which is held by the Judges to be sufficient to effect this transference; and the whole of the opinions of the Judges in this case is instructive. It was a conveyance by entail, made in the form of a procuratory of resignation, with obligation to infeft, and a general assignation of writs. The title of the maker of the entail consisted of a right to an unexecuted procuratory of resignation; and it was here taken for granted, that the procuratory was transmitted by the general assignation of writs, as effectually as if it had been specially assigned. The general doctrine now under consideration was also here established, that an assignation of the personal right, in combination with a procuratory of resignation and an obligation to infeft, or either of these, or with terms otherwise sufficiently expressive of the granter's intention to transfer the procuratory so as to enable the assignee to obtain infeftment, is a sufficient conveyance. There was here, it will be observed, not only an unexecuted procuratory assigned, but a second procuratory executed by the granter of the assignation. The second procuratory was held to amount, in such circumstances, to a mandate in favour of the assignee to execute the first.

FORM OF DISPO-
SITION AND
ASSIGNATION.

But the ordinary form of conveyance, in transmitting a personal right to lands, is, as we have stated, a disposition and assignation, the latter term indicating the personal nature of the right. The deed is in the same form as an ordinary disposition, with an obligation to infeft by two manners of holding, and all the other clauses which we have reviewed, but omitting the procuratory of resignation and precept of sasine, which already exist in an unexecuted form, and are to be transferred to the disponee. In the clause of assignation of writs, it was usual by the previous practice, after the general terms of assignment, to insert a special assignation of the unexecuted procuratory and precept, specified by reference to the disposition containing them, which was described by the names of the granter and grantee, and its date. Such a special assignment it is now unnecessary to insert, because the general clause prescribed by the Lands Transference Act is declared by the 3d section to import an absolute and unconditional assignation to the writs and evidents, and to all open procuratories and precepts therein contained, to which the disposer has right.

The effect of this deed is, of course, only to transfer to the receiver

the same personal right which belonged to the granter, for, as the latter had no real right, it is impossible that his transmission can by itself impart a real right to the disponee. It contains, however, the means of making the right real, and any delay in doing this is attended with danger from two sources, viz.,—1. A second disposition by the granter of the warrants assigned, if first completed by infestment, will exclude the assignee, and leave him dependent for indemnification upon the warrandice. The claim of warrandice will lie not only against the granter of the two dispositions, but also against the disponee who assigns his procuratory and precept, for he is liable for his author's deeds, if these shall be made real by infestment before the assignee is infest; *Dewar v. Aitken*, 17th July 1780. 2. The second hazard is a subsequent assignation of the unexecuted procuratory and precept, completed by infestment before the first assignee is infest. Assignations to debts are preferable, not according to their dates, but according to priority of intimation—a rule founded, as Mr. Ross observes, not upon reason, but upon expediency, in order to prevent fraud by secret transmissions. There are no means, however, of establishing such a criterion of preference in the transmission of personal rights to land, there being no debtor to whom intimation could be made, and the early judgments of the Court were inconsistent, it having been decided in 1676, that the assignation of an incomplete real right had no effect in competition with a party who had completed his right by infestment, while a contrary judgment was pronounced in 1699. The former rule certainly involved the true principle, inasmuch as it made the preference to depend upon the attainment of a real right by infestment. The holder of a personal right is never fully divested, until his assignee is infest, and the real right, as we have seen, remains in the granter of the procuratory and precept, until he is divested by the infestment of another. The preference, therefore, is to him who shall first by infestment carry the real right out of the party last infest into his own person; *Bell v. Gartshore*, 22d June 1737. This was the case of an estate purchased at a judicial sale. The purchaser extracted the decree of sale, but did not take infestment, and assigned his personal right. Thereafter, a creditor of the purchaser adjudged from him his right under the decree of sale, and obtained infestment upon the adjudication before the assignee was infest; the adjudger's real right was held to be preferable. Generally, a personal right remaining unfeudalized is subject to the hazard of being excluded by the creation of a real right in another party, who may not be bound, or not be able, although bound, to validate the personal right. An example is presented in *Lawrie or Boyes v. Lawrie*, 10th March 1854. There a party in 1796 obtained a disposition of lands, but was not infest. In 1830, the heir of the disponent served, and was infest; and in 1839, he became bankrupt

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EFFECT OF DIS-
POSITION AND
ASSIGNATION.

M. 16,637.

PARTY WHO
FIRST MAKES
HIS RIGHT REAL
PREFERRED.M. 2848; 2
Ross, L. C. 410.

16 D. 860.

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HOW DOES DIS-
PONEE OF PER-
SONAL RIGHT
MAKE IT REAL?

1. BY INFEST-
MENT ONLY.

2. BY CHARTER
OF RESIGNATION
AND INFEST-
MENT.

3. BY INFEST-
MENT AND
CHARTER OF
CONFIRMATION.

and was sequestrated. By force of the statutory transmission the trustee's title was held complete, and free of any obligation to convey to the disponee of 1796.*

How, then, is the disponee of a personal right to complete his title? If the right assigned stands upon a charter, his only course is to take infestment upon the charter. The instrument is the same as in the ordinary case, with the addition, that, in order to warrant the notary to pass infestment in his favour, the disponee must produce, or cause to be produced, to him, not only the charter containing the precept, but the disposition and assignation, or other deed, whereby he acquires right to the charter and precept, and the production of these must be set forth in the instrument. If, again, the personal right is contained in a disposition with unexecuted procuratory and precept, then, if the granter was infest public, the assignee may complete his title either by resignation or confirmation. He may resign upon the procuratory, and obtain a charter of resignation, which will set forth in the *quæquidem* both the disposition by the last-entered vassal, and the disposition and assignation in favour of the receiver of the charter. Infestment upon this charter will constitute a complete public right. But the disponee may prefer, (and this will be the general course, since it avoids the immediate expense of an entry with the superior,) to take infestment immediately upon the unexecuted precept of *sasine*, setting forth in the instrument, as already directed in the case of a charter, not only the deed containing the precept, but the disposition and assignation, or, as it is called by Stair, and in our familiar law language, the mid-couples, which connect him with the precept. He will thus, if the disposition authorizes an alternative holding, immediately divest his author of the personal right, and the granter of the disposition of the *dominium utile*, and his title may be made public at any time by charter of confirmation, which, under the previous

18 D. 47.

* There is a distinction between a personal right to lands, and a mere *jus crediti* to demand a valid charter on the footing that none has been yet obtained; and a competition may arise between parties claiming in right of the person who possessed such *jus crediti*. An instance of this occurred in *Edmond v. Magistrates of Aberdeen*, 16th November 1855. There, under articles of roup, A feued lands from the exposor, who, as superior, executed an original charter in his favour. The lands were subsequently acquired by B, who executed over them a bond and disposition in security, which was recorded. B having become bankrupt, his trustee, on the ground that no valid feudal right to the lands had ever been constituted, sued the successors of the exposor to grant, as superiors, a valid charter in his favour as trustee. The bond-holder appeared, and maintained that he had a preferable right to demand a charter. The Court held—1. That the bankrupt, owing to defects in the *tenendas* and precept of *sasine* in A's original charter, had a mere *jus crediti* to obtain a personal right in a form admitting of its being feudalized,—2. That this *jus crediti* was communicated to B's creditor by his bond and disposition in security, which imported a conveyance thereof,—3. That the registration of this bond in the register of *sasines* was equivalent to intimation of such conveyance, and vested the *jus crediti* in the bond-holder,—and 4. That the superior could not grant a charter to the trustee, except under burden of the bond-holder's preferable right. This judgment is under appeal.

practice, would have set forth the disposition, the mid-couples, and the sasine, but will now, in terms of the Lands Transference Act, specify the sasine alone. If the granter of the disposition containing the procuratory and precept was not publicly infeft, but held by a base infeftment, then his infeftment must be confirmed, in order to validate the procuratory, if the acquirer of it desires to enter by resignation, which he will then accomplish by obtaining a charter of resignation and confirmation in the form we have already described, taking care to set forth the mid-couples along with the disposition in the *quæquidem*, which is advisable, though not essential. Or, the granter of the precept being infeft base, the acquirer of it may also take a base infeftment in his own favour, setting forth in the instrument his right to the precept, and then confirmation of his own infeftment will complete his right as holding immediately of the superior.

We may notice here, that, although production must be made to the notary of all the links which connect the party infeft with the warrant, that rule is not extended, so as to render it necessary to set forth the authority of a factor or commissioner, when the disposition is executed under powers granted by the disponer; *Proctor v. Carnegie*, 14th May 1796. It was here decided not to be a fatal objection, that the sasine neither narrated the commission, nor bore production of it to the notary.

The enactment of the Statute 1693, cap. 35, preserving procuratories and precepts in force after the death of the granters and grantees, was made conditional upon this important provision, "that the instruments of resignation and seisins, taken after the death of either party, express the titles of those in whose favour the resignation is made, and to whom the sasine is granted, and that the same be deduced therein; otherwise to be void and null." This statutory nullity must be carefully kept in view. Its application in the case of sasines is clear, and has never formed the subject of doubt. In expediting infeftment, therefore, in favour of any party after the death of him to whom the precept was granted, there must be produced to the notary, and he must set forth in his instrument, not only the deed containing the precept, but the mid-couple or other right, whether it be a disposition and assignation, a general service, a general disposition, or an adjudication, which gives the party infeft right to use the precept. If this is neglected the sasine will be null. But with respect to instruments of resignation there was not room for a rule so clear and intelligible. As to instruments of resignation *ad remanentiam*, indeed, there could be as little doubt as in the case of sasines, for these form steps of the title, as important and indispensable as the sasine, and it is therefore certain that, if in an instrument of

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4. BY CHARTER OF RESIGNATION AND CONFIRMATION; OR BY INFESTMENT AND CHARTER OF CONFIRMATION.

AUTHORITY OF A FACTOR AND COMMISSIONER NEED NOT ENTER SASINE.

8871.

DEDUCTION OF TITLES UNDER 1693, c. 35.

1. IN THE CASE OF SASINES.

2. IN THE CASE OF INSTRUMENTS OF RESIGNATION *ad remanentiam*.

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3. IN THE CASE
OF RESIGNATION
in favorem.

resignation *ad remanentiam* taken after the death of the grantee of the procuratory it should be omitted to set forth the title by which the user of the procuratory obtained right to it, the omission would infer a nullity in the instrument. Instruments of resignation, however, never formed an essential part of the title, when the resignation was *in favorem*, so that the lands did not remain with the superior. Such instruments do not appear to have been uniformly prepared at any time; and, when they were used, it was not to constitute steps in the progress, but to give those in whose favour they were expedite a ground of action against the superior to compel him to complete their entry. The instrument was evidence of the fact of the resignation, and of the superior's acceptance of it, which imported an obligation upon him to infest the resignatory. As long as the instrument of resignation *in favorem* was used for this purpose, or for any purpose, its validity would clearly depend upon its compliance with the statutory provision in the insertion of the party's title, when he resigned upon a procuratory after the death of the receiver named in it. After the Heritable Jurisdictions Act, 20 Geo. II. cap. 50, it is evident, that instruments of resignation *in favorem* could serve no purpose whatever to the grantee of a procuratory, for he was empowered by that Act to charge the superior to enter him. Accordingly, they have since fallen into disuse, and are never met with in modern practice. At the same time a notion has prevailed in some quarters, that, as the Statute requires the title to be deduced after the grantee's death, and that only in the instrument of resignation, which alone is the object of the statutory nullity, such instruments were indispensable in the particular case of a title expedite after the death of the receiver of the procuratory. That idea, it appears, continued to be entertained even after the Infestment Act of 1845, which in its 9th section abolishes instruments of resignation *in favorem* without distinction, upon the ground that, as separate instruments, they were intended merely to connect the procuratory with the charter of resignation, and that they are now rarely used in practice, and are wholly unnecessary. The question, however, has now been tried, and the sufficiency of the title sustained, although no instrument of resignation was ever prepared or extended; *Renton v. Anstruther*, 14th November 1848. The opinions of all the Judges were taken in this case, and should be carefully perused.

11 D. 37;
2 Ross, L. C.
146.

DEDUCTION OF
TITLE IN CHAR-
TER OF RESIG-
NATION; 8 & 9
Vict. c. 35.

While the use of instruments of resignation *in favorem* was given up, the practice was adopted of observing the statutory direction by embodying the deduction of titles in the charter, and, accordingly, by universal custom the *quæquidem* sets forth all the titles of those in whose favour procuratories to deceased grantees are executed. The practice, as we shall presently find, is now sanctioned by statute, but it was previously conceived, that the neglect of it exposed the titles

to the operation of the nullity. This question, however, was also tried in the case of *Renton* last cited; and it was the opinion of the Court, that the omission of deeds in the *quæquidem* does not imply a nullity, the nullity being by the terms of the statute applied to instruments of resignation only. At the same time, the practice of accurate deduction was distinctly approved, as one which no experienced Conveyancer or Counsel would overlook, and it now rests upon statutory authority, the Infestment Act, 8 & 9 Vict. cap. 35, enacting in § 9, that the deduction of titles, required by the Act 1693 to be made in the instruments, shall from and after the date of the Act be made in the charter, of resignation.

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In the transmission of the personal right we have pointed out, that the proper form of conveyance is to assign the existing unexecuted procuratory and precept, and to omit these clauses in the disposition to the purchaser. There is no incompetency, however, in taking a procuratory and precept even from a disponent possessing upon the personal title; and in peculiar circumstances it may be advisable to do so. It is true, that infestment upon the warrant of a party who has no real right is ineffectual; but the right of the granter may be completed afterwards by infestment, and that completed right, whenever it is effected, accresces so as to validate the infestment of the grantee. This is under the rule, *jus superveniens auctori cedit successor*—a principle inherent in the nature of warrandice, which, as it obliges the disponent to make good the disponent's title, necessarily binds him to contribute to the fortification of that title every right which shall accrue to himself. We shall have occasion to revert to the doctrine of accretion again in treating of the conveyance by an heir not entered. It is only in emergencies, that a Conveyancer would infest the disponent of a party whose right is personal, as, for example, in circumstances of urgency, when it is desired to take a conveyance for the sake of security, but the titles cannot be procured. By infesting the disponent there is laid the foundation of a title which may be validated afterwards by sasine in favour of the granter, should his right prove to be personal, and the subsequent completion of his right will accresce first to the first infestment flowing from him, agreeably to the rule which will presently be explained.

WARRANT OF
INFESTMENT BY
PARTY NOT IN-
FEFT.

Ersk. Inst. ii.
7, 3.

It is to be remarked here, that it is only the grantee of a personal feudal right who can assign its warrants. The granter after executing the disposition has no longer any control over the warrants. They can only be assigned by the grantee. An attempt to assign a precept of sasine by the party who had granted it was found inept, in *Gammell* 12 D. 19. v. *Cathcart*, 13th November 1849.

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The next case of transmission where the grantor's right is personal is

The Disposition by an heir unentered.—The heir not having made up his title, the lands are in *hæreditate jacente* of his ancestor, out of which they must be conveyed by an act voluntary or judicial, and vested in the heir, before he can grant a disposition containing the means of immediately divesting himself. We shall afterwards have occasion to examine the modes of conveying heritable property from the dead to the living by service or precept. Until that is done, no conveyance immediately effectual can be granted by the heir, because the fee is in his ancestor's *hæreditas*, and cannot be transferred to a purchaser, until it is first vested in his own person. Although, however, the grantee's right cannot be made instantly real, that is no hindrance to the conveyance being immediately granted, and infeftment taken in his favour, in the view of these being validated by the rule *jus superveniens* upon the completion of the heir's title.

We must here ascertain the condition of the ancestor's title.

1. DISPOSITION
BY HEIR UNEN-
TERED, WHERE
ANCESTOR IN-
FEFT.

(1.) If the ancestor was infeft, the heir must along with the conveyance of the lands grant authority to complete his own title. The mandate may be separate, or it may be inserted in the disposition. The grantor is designed eldest lawful son, (or otherwise,) and apparent heir of the deceased heritable proprietor. Immediately before the obligation to infeft there is a clause binding him to procure himself upon his own expenses duly and lawfully served and retoured heir to his ancestor, and infeft and seised in due and competent form. After the obligation to infeft there is an appointment of blank procurators to purchase, procure, and obtain the grantor infeft as heir, by service and retour, precept of *clare constat*, or otherwise. The introduction to the precept of sasine also marks the condition of the title:—"As if I were already infeft and seised, and then as now, and now as then, I desire," &c.

ACCRETION.

Upon receiving the disposition in these terms, the disponee may take infeftment, and proceed to get the heir's title completed. The effect of the completion is to convey the estate from the *hæreditas* of the ancestor into the heir's person, and by the rule, *jus superveniens auctori accrescit successori*, it instantly passes into the disponee by virtue of his prior infeftment. *Fictione juris* the right was in the heir when he contracted, and the disponee's sasine is, therefore, validated from its date, although prior to the heir's title. The general doctrine of accretion is strongly exemplified in *Glassford's Executors v. Scott*, 9th March 1850. It was the case of a bond of annual-rent, granted by an heir of entail before he had any title, and without the concurrence of the heir then in possession. The completion of the grantor's title upon a conveyance of subsequent date was held to accresce to, and validate, the bond. The effect of this principle in a

competition of infeftments is illustrated in the case of *Neilson v. Murray*, 22d December 1738. There, the common debtor had granted several infeftments before he was himself infeft; and the question arose, whether his infeftment, when it was taken, had the effect to bring them all in *pari passu*, or whether they were preferable according to priority of date. The argument will be found stated with beautiful clearness, that all the competing rights were derived through the same author, who was bound by the rule, *jus superveniens*, and excluded *personali exceptione* from pleading the defect of his own right at the date of the first infeftment. But the holders of the posterior infeftments derived their right through him, and they were also, therefore, debarred from pleading that defect. The Lords preferred the claimants according to the priority of their infeftments. The same principle is strikingly illustrated in *Paterson v. Kelly*, 10th December 1742. Girdwood, possessing upon a personal title without infeftment, granted an heritable security to Kelly, and afterwards an heritable security to Paterson, upon which Paterson was immediately infeft, before sasine was taken on the first bond. Kelly, discovering that Girdwood, the proprietor, was not infeft, obtains infeftment to be taken in favour both of Girdwood and of himself. But these infeftments being posterior in date to Paterson's, the Court held, that the author's infeftment accresced first to Paterson, and operated *retro*, so as to validate it from its date. It makes no difference in the rule that the common author is not infeft until a competition arises. His infeftment, whensoever it may be taken, accresces first to the sasine first in date.

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M. 7773.

M. 7775;
3 Ross, L. C.,
704.

When the ancestor had only a personal right upon a disposition with open procuratory and precept, we might proceed in the same way as if the heir had no intention to sell, and make up his title by general service connecting him with the personal right, and infeftment in the base right, or charter of resignation and infeftment; after which the author would be in a position to grant warrants of resignation and infeftment himself. Assuming this form of procedure to be adopted, it is evident that the heir may competently at once grant disposition with procuratory and precept himself, and that the subsequent completion of his own title by service and infeftment will accresce to his disponent's sasine. In this view the doctrine of Erskine is not open to censure. But, in the case supposed, the transference can be made in a shorter and less expensive method. The heir will grant a disposition not containing procuratory or precept, but assigning those in favour of his ancestor which are still unexecuted. In order to validate the assignation, his title to these warrants must be made up by general service. This can be done either before or after

2. DISPOSITION
BY HEIR UNEN-
TERED, WHEN
ANCESTOR NOT
INFEST.

Inst. ii. 7, 26.

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granting the disposition. In the latter case he will grant in the deed or separately, an obligation to complete his title, and a mandate to the disponent to expedite his service. The service, however, must be expedited before the disponent's infeftment, because it must be expressed and deduced, along with the heir's disposition and assignation, in the sasine, in compliance with the Act 1693, cap. 35; and, if the purchaser shall prefer at once to enter with the superior by resignation, the charter must also now contain the deduction of titles in compliance with the Infeftment Act.

REAL RIGHT
FLOWING FROM
PARTY WHOSE
TITLE IS PER-
SONAL.

It is very necessary to keep in view the effect of a right intended to be real, derived from an author whose title is only personal, and who does not assign his personal right, but grants dispositions with warrants for resignation and sasine, in the same way as if his right were complete. It is evident, that sasine following upon such warrants can have no effect in giving the disponent a real right as long as the granter of them remains uninfeft, because, having no feudal estate himself, he is incapable of imparting one to another. The fee remains vested in the last vassal infeft, and the progress of its transmission is interrupted by the warrants of the last vassal remaining unexecuted with the party to whom they have given a personal right. The infeftment of that party will at any time validate his disponent's sasine by the force of the rule, *jus superveniens*. But, if the disponent shall die without being infeft, then the disponent's title is inept, and cannot be validated by completion of his author's title; for, though a sasine may be confirmed, it evidently cannot be taken, after the death of the party. Of this important rule, and its effects, the authorities present distinct examples. In *Keith v. Grant*, 14th November 1792, A, not infeft, granted an heritable bond, with warrant of infeftment in favour of B, who was infeft. On the death of A, his heir made up a title. It was held, that the heir's title could not accresce to validate the security, because it flowed *a non habente*. The creation of a right in the heir could not impart any supervening right to his ancestor who was dead, so as to be communicated to that ancestor's prior deeds. The heir, no doubt, by making up a title, became bound for his ancestor's obligations, as representing him, but that is a liability personal to the heir independently of the condition of the predecessor's title; and, in the case supposed, the heir of necessity passes him over as regards any real right, for the estate continues vested in the vassal last entered or infeft, and the heir can only divest him, and carry the right into his own person, by service, not to his ancestor, who had no real right, but to that vassal, or by using the warrants granted by him. These warrants, no doubt, must be taken up by general service to the ancestor in whose favour they were granted. But what is the purpose and

M. 2933;
3 Ross, L. C.
308.
AN HEIR'S IN-
FEFTMENT DOES
NOT ACCRESCE
TO A RIGHT
GRANTED BY
HIS ANCESTOR
WHO DIED UN-
INFEFT.

effect of that service? It is to enable the heir or his assignee to convey the real right, not from the ancestor, for he had it not, but from the granter of the warrants to himself. It is thus clear that there never is, and cannot be, a real right vested in the ancestor who dies not infeft, and, therefore, no *jus superveniens* can be derived from him to validate rights which he has granted. The same principle is clearly exhibited in another form in *Martin v. Wight*, 3d February 1841, where a precept of *clare constat* for entering an heir was granted by a body of trustees, all of whom died without having being infeft. They had, however, assumed other trustees, in whose favour infeftment passed, and it was contended, that this completed right accresced to validate the precept, inasmuch as the trustees were one body with a continuing succession. But the Court held the precept to be null, as flowing from granters who had no real right.

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3 D. 485.

Having thus examined the different modes of transmitting the estate of the vassal, or *dominium utile*, we proceed to examine the transmission of the superior's estate; and, in the first place,

TRANSMISSION
OF SUPERIOR'S
ESTATE.

The disposition by the superior to the vassal.—The object here is to substitute the vassal in his superior's place, so that, instead of holding of the superior, he shall henceforth hold of the over-lord of whom the superior holds. In order to this, he must obtain a disposition from the superior, and complete his title like any other purchaser.

1. DISPOSITION
BY SUPERIOR TO
VASSAL.

The form of the disposition is the same as in the ordinary case, with certain variations arising from the peculiar object of this transference. The granter styles himself superior of the lands, and by the dispositive clause the lands themselves are disposed; and it may be mentioned, although it is not at all necessary to do so, that the disponee is already vested with the *dominium utile*. The destination should be to the vassal, with the same heirs substituted as in the titles of the property, in order that, when the two estates are combined, the destinations may harmonize. The chief variation is in the obligation to infeft. There is no room here for alternative holdings, for the object would be defeated by a holding *de me*. The obligation, therefore, is limited to the holding *a me*, and there is of course a procuratory of resignation. The warrandice is limited to the *dominium directum* by excepting the feu-right granted by the disponer or his predecessors to the disponee or his authors. The feu-duties and casualties may either be assigned, or they may be discharged, since the transmission to the vassal will necessarily extinguish them; and a discharge even of bygone feu-duties is implied by granting a disposition of the superiority to the vassal himself; *Earl of Argyle v. M.* 842. *M'Donald*, 14th December 1676. A precept of sasine is in practice

FORM OF DEED.

NO ALTERNATIVE
HOLDINGS.

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COMPLETION OF
DISPONEE'S
TITLE.

usually inserted in this deed. But it may here be qualified with terms limiting the infeftment to a public holding.

Upon this disposition, as in the case of transmission of the feu by *a me* holding, already discussed, the title may be completed either by charter of resignation followed by infeftment, or by sasine upon the disposition, and charter of confirmation. We must now remark the position of the donee. He has the *dominium utile* by the feu-right, holden of his recent superior, and now of himself; and he has also the *dominium directum* holden of the over-lord. These are separate estates possessed by distinct titles. If they are destined to different classes of heirs, they will descend separately, according to their respective destinations. If the destination be the same, separate titles will still be requisite effectually to carry down the two estates, while they remain separate.

CONSOLIDATION
OF PROPERTY
WITH SUPER-
IORITY.

But they may be consolidated into one estate by resignation *ad remanentiam*. The *dominium directum* being the nobler possession, and the main trunk from which the feu sprung, it remains as the permanent estate. The party, in order to avoid the apparent anomaly of the resignation being given and taken by the same person, executes a procuratory of resignation *ad remanentiam*, which bears, that he is both superior and proprietor, and appoints procurators to appear before himself or his commissioners, and to resign *ad remanentiam*, that the rights may be consolidated, and remain inseparable. An instrument (the form and requirements of which we have already discussed) being expedite and recorded, the right is completed by the extinction of the vassal's fee, and the two estates being united descend to the same heirs, and by one and the same set of titles. This mode of completing the titles, where the *dominium eminens* and the *dominium utile* come as separate estates into the same person, was practised from an early period, and it received judicial sanction in the important case of *Bald v. Buchannan*, 8th March 1786; affirmed 3d April 1787. Here, the superiority and property were held by separate titles, and no consolidation by resignation *ad remanentiam* took place. The heir entered by special service and infeftment under the Crown's precept, and executed an entail. But after his death the heir-at-law, who was excluded by the entail, challenged the deed, on the ground that the title expedite carried the superiority only, and that the property being still *in hæreditate* of the ancestor, no real right affecting it had been carried by the entail, and that she was entitled to serve to the ancestor last vest, and to take the property. The Court sustained this argument, and reduced the entail. This decision should be carefully studied, for erroneous impressions have sometimes been received with respect to its import. It has been supposed to imply, that, where the two estates are held by separate titles, a disposition of the lands will be ascribed to the nobler title, and carry the superiority

only. But this is a mistake. By the decision in this case, the superiority only was carried, because it alone was vested in the maker of the entail. If he had had a real right in the property, there is no doubt, that the same conveyance disposing the lands "with all right, "title," &c. would have transmitted that estate as well as the superiority, although held by separate titles. The defect in the entail, therefore, was only a consequential result of the want of consolidation. The first effect of that omission was to leave the estates dependent upon distinct transmissions, so that, while the superiority was carried down to the heir, the property remained *in hereditate* of the ancestor, and was consequently not carried by the heir's disposition.

In describing this consolidation, we have assumed, that the vassal acquiring the superiority was publicly infeft in the property, so that, after being infeft in the superiority, he holds the property immediately of himself. It is only where this is the case, that resignation *ad remanentiam* can take place at once, because the procuratory must flow from an entered vassal. If, therefore, the party was infeft base, he must now as superior confirm his own sasine; and, in any circumstances, the title of the property must be so completed as to make him hold directly of himself, and thus become capable of giving an effectual warrant to resign.

The case of *Bald* shews clearly, that, when the estates of superiority and property are possessed under separate titles, consolidation by resignation *ad remanentiam* is advisable, in order to obviate risk of error, and to secure the transmission of both estates as one property, and by one title, to the same disponent. That rule, however, is subject to this qualification, that, as possession for forty years upon charter and sasine forms a good title, so, the superior's title being *ex facie* absolute, possession by him in the absence of any other possession or act inconsistent with his right is a good title to the *dominium utile*. In *Middleton and Paterson v. Earl of Dunmore*, 22d December 1774, an M. 10,944. estate having been forfeited by high treason on the part of the vassal in the rebellion of 1715, the superior acquired the possession, but failed to take the steps prescribed by the Act 1 Geo. I. cap. 20, in order to make up his title to the property. By rights flowing from the superior, possession was had for more than forty years, and a purchaser having objected to the sufficiency of the progress, the Court held, that, "as the right of the superior is a right to the lands *ex facie* simple and absolute," "and, as the right of the vassal is no more than a burden upon the *dominium directum*, so, when the superior in virtue of his infeftment of the lands has had full possession of the *dominium utile* for the space of forty years without any challenge or interruption, the vassal's right is thereby totally at an end, and the superior's right is effectually disburdened of it; his

CONSOLIDATION
BY PRESCRIPTION.

- PART III. "possession of the *dominium utile* for the space of forty years is as
CHAPTER III. "effectual for extinguishing the right of the vassal, as a resignation
12 S. 74; "made by the vassal *ad perpetuam remanentiam*." The same rule
3 Ross, L. C. was applied in *Lord Elbank v. Campbell*, 21st November 1833, so as
534. to subject to the fetters of an entail the *dominium utile* of lands,
whereof the superiority only was included in the entail titles, the
property having been possessed by the entailer upon a separate base
right. Consolidation was here held to have taken place by forty
years' possession. This doctrine was affirmed by the House of Lords
in *Graham v. Bontine*, 6th August 1840, which was a very strong
1 Rob. App. exemplification of the rule, the heir of entail having been subjected
347; 3 Ross, in an irritancy of the whole estate for selling the portion which had
L. C. 568. become subject to the fetters only by prescription. The rule was
applied to fee-simple titles in *Wilson v. Pollok*, 29th November 1839,
2 D. 159; Lord MACKENZIE remarking, that the doctrine ought to be limited to
3 Ross, L. C. the case where the two fees stand destined throughout to the same
571. series of heirs, a contrary construction being applied, where a right
is held under two titles, as in *Durham v. Durham*, 24th November
M. 11,220; 1802, where, notwithstanding possession for nearly eighty years as
2 Ross, L. C. heirs of line, effect was given to a prior destination excluding heirs
582; 3 Ross, portioners. It is thus firmly settled, that prescriptive possession upon
L. C. 531. the title of superiority effectually consolidates the property with that
estate, both titles being to the same heirs.

We are, in the second place, to consider the transmission of the superior's estate to another than the vassal.

2. DISPOSITION
BY SUPERIOR TO
THIRD PARTY.

Disposition by superior to stranger.—It is to be observed, first, that an estate of superiority can only exist, so as to be capable of transmission, after separation of the property by charter and infeftment. The estates cannot be separated by words or description, but only by actual infeftment detaching the property from the original *plenum dominium*. It was attempted in vain, therefore, to effect a separation by conveying the *dominium directum* to one disponee, and the *dominium utile* to another, no vassalage having been created by infeftment; *Norton v. Anderson*, 6th July 1813.

F. C.; 1 Ross,
L. C. 31.

SUPERIOR CAN-
NOT INTERJECT
MID-SUPERIOR.

Where by the investiture of a vassal a dependency has been created, the superior is subjected by the principles of the feudal law to certain restraints in the disposal of the *dominium directum*. These do not affect the conveyance of the superiority to the vassal, because it is for the protection of his rights that the disabilities referred to have been imposed. They are founded upon the general principle, that alienation of the superiority can only be made, "*dummodo vassalli con- ditio non sit deterior*." Although, therefore, the superior's estate may be sold to be holden of the Crown, or of any other over-lord, he can-

Craig, ii. 11, 35.

not, after granting the feu, give another subaltern right, whereby the vassal would be made subordinate to an additional superior. This is not allowed, because the vassal would thus be removed a degree further from the lord-paramount, the disadvantage of which is manifest, when we consider, that, if it should become necessary for him to enforce an entry, which upon the failure of the immediate superior is effected by charging the whole superiors upwards successively until he reaches the Crown, he would have one superior more to charge, if interjection were permitted. In Crown grants the introduction of an intermediate superior was prohibited in the year 1400 by an Act of Robert III. ; and the same rule was applied to subject superiors in *Douglas v. Torthorell*, 25th June 1670, and the subsequent case of *The Archbishop of St. Andrews v. Marquis of Huntly*, December 1682. When, in a succession of subordinate estates, an intermediate feu has fallen into the superior's hands by forfeiture, the rule under discussion does not prevent his bestowing the forfeited estate upon a new vassal, because the inferior vassals are not reduced to a lower degree than when they were entered. The rule, we have seen, is designed to guard the vassal's interest ; the objection, therefore, is competent to him only, and his acquiescence will bar challenge. So, in *Hotchkis v. Walker's Trustees*, 6th December 1822, the vassal having acquiesced, it was found, that the interjected superior could not be deprived of the feu-duties and other rights of superiority by a party acquiring the mediate superiority.

There is this further qualification, that the superior's incapacity is limited to the radical right. He can burden the *dominium directum* with securities constituted by base holding, whereby the receivers obtain right to levy the feu-duties from the entered vassals ; *Home v. Smith*, 22d January 1794.

The other restraint upon the transmission of the superiority is, that it cannot be conveyed in divided portions, so as to subject the vassal in performance of the services to more than one superior ; *Duke of Montrose v. Colquhoun*, 31st January 1781, affirmed 19th February 1782 ; and to the same effect is *Graham v. Westenra*, 23d May 1826. Upon the same principle, we shall afterwards see, that a vassal is not bound to take an entry by separate portions, when the superiority descends to heirs portioners. But, when there are several subjects held by separate titles, and the property of them all comes into one person, and the superiority into another, that circumstance does not prevent a sale of the portions of the superiority separately, provided they have never been blended into one estate ; *Dreghorn v. Hamilton*, 5th August 1774 ; and, even although the separate portions are inserted in one charter, yet, if they are described separately, and have distinct clauses of red-

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Ersk. Inst. ii.
5, 4.

Thomson's
Acts, i. 213.

M. 15,012.

M. 15,015.

2 S. 70.

BUT SUPERIOR
MAY BURDEN
dominium di-
rectum.

M. 15,077.

SUPERIOR CAN-
NOT SPLIT do-
minium direc-
tum, SO AS TO
MULTIPLY SUPE-
RIORS.

M. 8822.

4 S. 615.

M. 15,015.

- PART III. *dendo*, the superior has still the power of separate disposal. A sale in such circumstances was reduced in *Lamont v. Duke of Argyle, &c.*, 23d June 1813; but the decision was reversed, 8th February 1819. It is not a multiplication of superiors to vest the *dominium directum* in two persons *pro indiviso*, because it does not belong to them in severed portions, but each has a common right to the whole; *Cargills v. Muir*, 21st January 1837. This objection may be obviated by stipulating in the vassal's charter, that the superior shall be at liberty to convey the superiority in separate portions as he shall see fit, a reservation once common when the elective franchise depended upon a right to superiority of a certain value. Where the vassal, however, has consented to a specific multiplication, his having done so will not bar him from objecting to a subsequent and different multiplication; *Mure v. Westerra*, 18th May 1824; nor is the objection excluded by a division of the liferent of the superiority having subsisted for forty years; *Stewart v. Houston*, 14th May 1823.
- CHAPTER III.
F. C.
- 15 S. 408.
OBJECTION OF
MULTIPLICA-
TION OF SUPE-
RIORS, HOW
OBTAINED.
- 3 S. 17.
- 2 S. 300.
- PECULIARITIES
IN FORM OF
DISPOSITION OF
SUPERIORITY TO
A STRANGER.
- DISPOSITIVE
CLAUSE.
- F. C.
- F. C.; 1 Ross,
L. C. 22.
- 8 D 534.
- OBLIGATION TO
INFEST.
- ASSIGNATION OF
FEU-DUTIES.
- The *dominium directum* being transmissible under these rules and qualifications, we proceed to notice such of the clauses in the disposition of superiority to a stranger as present any peculiarity.
- In the dispositive clause the lands themselves are conveyed, because the *dominium directum* is the radical right. It is unnecessary, when the superior, after having granted the feu, takes an entry from his over-lord, or disposes, to designate the estate remaining in his person as the superiority or *dominium directum*. Formerly, indeed, it was deemed an objection to the title if it was so described. In *Park v. Robertson*, 16th May 1816, parties infeft in the superiority and feu-duties of lands were found not entitled to pursue a declarator of non-entry, because, not being infeft in the lands, they had no fundamental right, and could not ask the *dominium utile* to be declared to be theirs. In the subsequent case of *Hamilton v. Bogle*, 23d February 1819, where the disposition and sasine bore "the *dominium directum* or right of superiority of the lands," the decision in *Park's* case was so far trenching upon, that this was held to constitute a good title for a freehold qualification; and the prior decision was altogether contradicted in *Gardner v. Trinity House of Leith*, 9th February 1841, infeftment in the superiority or *dominium directum* being sustained as a good title to pursue a declarator of non-entry. It is thus settled, that a disposition and infeftment of the superiority of the lands is a good right to the *dominium directum*.
- The obligation to infeft must be limited, as already noted, to the *a me* holding, for a tenure *de me* would create an intermediate estate, which the superior is not entitled to do.
- In this conveyance the feu-duties must be assigned, for the vassal

continues debtor in the feu-duties, and they cannot, therefore, be discharged, as in the conveyance to himself.

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The last peculiarity is in the obligation of warrandice, which must specially except the vassal's right, this exception in the strict form of the deed being the only indication that it is the superiority alone that is conveyed, for it shews the subject to be the lands without the *dominium utile*. The practical effect of this qualification of the warrandice is strikingly shewn in the case, already cited, of *Cheyne v. Smith*, 7th June 1832, where the exception of a prior conveyance in the warrandice of a second conveyance was held to keep it open to the first disponent to take up the full right of the disponent after forty years' possession upon a base infeftment.

CLAUSE OF
WARRANTICE.

10 S. 622.

The chief purpose for which the conveyance of superiorities was long used was, in order to constitute freehold qualifications, giving the right to vote for members of Parliament in counties. The Act 2 & 3 Will. IV. cap. 65, however, passed in the year 1832, "to amend the representation of the people in Scotland," repealed by its 47th section all previous statutes and usages in so far as inconsistent with its own provisions; and as, under these provisions, the former qualifications and mode of enrolment no longer subsist, the practitioner is not now called upon to perform those duties in the adaptation of estates of superiority to the creation of votes, which formerly exercised the ingenuity of the profession. By the 6th section of the Act, however, the effect of votes and qualifications acquired before 31st March 1831 is retained, and, on that account, as well as from the frequent occurrence, in the title-deeds of land estates, of such writs as were used for the purpose of making freeholds, it is necessary to understand the nature and effect of these instruments; and we shall, therefore, briefly state the principles and method of their preparation and use. By these means we shall have the benefit of observing feudal principles illustrated by circumstances which were singularly fitted to exhibit their peculiar character and force.

FORMER MODES
OF CONSTITUT-
ING FREEHOLD
QUALIFICA-
TIONS.

By the older statutes, particularly 1681, cap. 21, and 16 Geo. II. cap. 11, § 9, the right of voting in counties was confined to parties publicly infeft in property or superiority, and in possession of a forty shilling land of old extent holden of the King or Prince, or liable for public burdens on £400 valued rent. In order to the enjoyment of this privilege, it was not necessary that the claimant should be infeft in the *dominium utile*. It was sufficient that he had a title to the superiority either in fee or in liferent. Votes were accordingly created in various ways. If a party possessed lands holden of the Crown, of which the old extent or valued rent was so large as to afford several qualifications, each amounting to a forty shilling land, or £400 of valued rent, he first separated the property from the superiority by

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 FREEHOLD QUALIFICATIONS,
contd.

granting a feu-right to a friend, who executed a back bond or letter acknowledging that it was in trust. The trustee being infest, the *dominium utile* was separated. Then the owner conveyed to the intended voter the superiority by a disposition *a me*, upon which he obtained a charter from the Crown, and being infest was entitled to be enrolled. Afterwards the trustee reconveyed by a disposition in common form the *dominium utile* to the original owner, who could then complete his title as subvassal of the voter. When there were several votes to be created, the *dominium utile* being first separated by a feu-right, the proprietor, in order to save the expense of separate charters, instead of at once conveying to the intended voters their respective portions, executed a procuratory of resignation for new infestment to himself, and having obtained a Crown charter of resignation, he then granted to each voter a disposition of his portion of the lands with an assignation of the open precept, in so far as relating to these lands. Infestment upon the charter and disposition completed the voter's title, and then the proprietor was re-invested in the *dominium utile*. The same operation could be performed in a more succinct form, if the proprietor granted to the intended voter an absolute conveyance of the property with an obligation on him to re-convey the *dominium utile* after completing his title. That obligation required to be inserted in the disposition, as the voter had to be ready to swear that he held the lands under no other conditions than those contained in the titles. The voter then resigned upon the disposition, and having completed his right as a crown vassal, he afterwards granted a feu-charter to the proprietor.

When a proprietor of lands holden of the Crown, capable of affording several votes, sold his property under reservation of one vote to himself, the arrangement was carried into effect by his conveying the lands to which the reservation did not apply by a disposition in ordinary form, but granting a feu-right of the portion which was to constitute his qualification. The purchaser thus got the *dominium utile* of that portion, the superiority remaining with the seller.

In the modes now described, votes were said to be made by constituting estates of superiority, the portions of land being separately conveyed in each disposition. Votes might also be made by splitting estates of superiority already existing. Thus a party possessing the *dominium directum* of Crown lands of £800 valued rent could create another vote besides his own by conveying the *pro indiviso* half of the lands, with warrants for a public holding, the right of property being excepted from the warrandice. Here the voter would complete his right by charter of resignation or of confirmation. In this case, however, it was necessary to guard against objection by the vassal by obtaining his consent to multiplication of superiors. No splitting of the old extent valuation was allowed.

By methods similar to those we have described, liferent qualifications were constituted, the only difference being that the conveyance of the *dominium directum*, with the assignation of the unexecuted precept, and the sasine were all for the disponent's liferent right only. The vassal could object here also, if there was a multiplication of superiors. Resignation *ad remanentiam*, made to consolidate the property and superiority after the constitution of a liferent of the superiority, does not extinguish the liferent; *Dundas v. Campbell*, 26th May 1812, F. C. affirmed on appeal.

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FREEHOLD QUALIFICATIONS,
contd.

It appears unnecessary to dwell longer upon this subject. What has been stated will afford preparation for encountering and understanding frequent renewals of Crown rights in progresses of titles, and the other instruments employed in separating the property, conveying the superiority, and re-investing their owner with the property—proceedings which would be unintelligible without a knowledge of the former nature of the freehold qualification.

It only remains to add, and this may be useful still in practice, in order to preserve votes standing upon the old qualification, that when a Crown vassal sells his property, he may preserve his freehold, either (1.) by qualifying the disposition with a condition debarring the disponent from resigning or confirming during the disponent's life; *Dunbar v. Urquhart*, 23d February 1774; or (2.) by obtaining from the disponent a separate obligation not to enter with the Crown during the grantor's life; *Russell v. Ferguson*, 7th March 1781.

HOW OLD
VOTES STILL
PRESERVED.

M. 8826.

M. 8828.

It may be noted also, as strikingly illustrative of feudal principle, that no one claiming as infest in the superiority could be enrolled, if objected to, unless he could show that he had a vassal. Hence the necessity of separating the *dominium utile*; and that could only be done by granting a distinct title so as to create a subinfeudation. A reservation of the *dominium utile* in the assignation of the charter was ineffectual for this purpose, because the grantor could not by such a reservation put on the feudal character of the assignee's vassal; *Norton v. Anderson*, 6th July 1813.

VOTER MUST
HAVE HAD A
VASSAL.

F. C.; 1 Ross,
L. C. 31.

II. VOLUNTARY TRANSMISSION *intuitu mortis*.

We have now examined the various forms of transmission by which heritable property is transferred *inter vivos*, and we proceed to inquire into the modes of conveyance of heritage employed in the contemplation of death. Of these the one which first claims attention is

1. *The Contract of Marriage in relation to Heritable Property.*

In treating of the marriage contract with regard to the moveable rights of the parties, we shewed, first, the disposition which the law makes by itself of such rights in the absence of agreement, and

PART III. afterwards, we inquired into the modes of controlling or modifying the

CHAPTER III.

effect of the legal distribution, where it is deemed advisable to prevent it from taking effect. In pursuance of the same plan, we shall now, in the first place, show how the heritable property of the spouses will be disposed of, if the law be left to take effect, and then exhibit the modes established by practice for obviating such results of the legal disposition as may not be deemed suitable to the parties' views or circumstances.

1. LEGAL DIS-
POSITION OF
HUSBAND'S
HERITABLE
ESTATE.

TERCE.

Hume, 293.

The husband's heritable estate remains subject to his own exclusive control and power of disposal. By the feudal rule of succession it descends upon his death to his heir-at-law, who takes it, however, subject to a right in favour of the surviving wife to receive during the remainder of her life one-third part of the rents of the heritable subjects in which her husband died infest. The right arises also upon the husband being divorced, when the wife may obtain decree for terce; *Ralston v. Leitch*, 18th November 1803. This right of *terce* (*tertia*) is shown by the *Regiam Majestatem* to have prevailed among our most ancient customs, its origin being ascribed to a natural right on the wife's part to receive support out of the husband's property. This claim, and the husband's right of *courtesy*, are both constituted by the mere relation of marriage, without compact, and are fixed upon the subjects without infestment. Formerly,

TERCE DEPENDS
UPON HUSBAND'S
SASINE.

the terce was one-third of the rent of lands in which the husband was infest at the date of the marriage, but it was afterwards fixed to extend to that proportion of the rent of the lands in which he was seised at his death. Lands held by personal title are not, therefore, subject to terce, but the widow has recourse against the husband's representatives, if sasine has been fraudulently or wilfully omitted, so as to injure her legal claim. Certain heritable properties are not liable in terce, viz., feu-duties, because resulting from the estate of superiority, with which originally it was held unbecoming that a female should be connected. This rule will be found adhered to on this ground, with some doubt on the part of Lord MONCREIFF, in *Nisbett v. Nisbett's Trustees*, 24th February 1835. Terce also does not extend to rights of reversion, patronages, leases, and burgage tenements. The husband's sasine being the criterion of the extent of the terce, that right is not defeated by any deed granted by the husband, which has not been followed by infestment. An heritable bond not made real by sasine, therefore, forms no deduction from the terce; and, in *Macculloch v. Maitland*, 10th July 1788, the lands having been sold, but the purchaser not infest at the husband's death, the widow was found entitled to her terce. Terce is excluded, however, where the husband has been divested of the fee; *Cumming v. The King's Advocate*, 10th February 1756. Here, he had resigned the lands, and taken a new charter to himself in liferent and his son in fee, and, although

EXEMPTIONS
FROM TERCE.

3 S. 517.

M. 15,866.

M. 15,854.

there was a reserved power to himself to burden and sell, terce was not allowed. But, in order to produce this effect, the husband must be truly divested, and the terce is claimable notwithstanding alienations ostensibly absolute, but which truly leave the fee in him; so, where he had granted a disposition *ex facie* absolute, but qualified by a backbond, which shewed that the real purpose was to create a security for a sum of money, terce was allowed in so far as the property was not burdened with debt; *Bartlett v. Buchanan*, 21st February 1811, and 27th November 1812. On the same principle, it is not diminished by adjudications, unless they have been followed by sasine before the husband's death; nor is it affected by the superior's claims on the heir's non-entry.

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This right is made effectual by the process of serving or kenning the widow to her terce, which is described in Mr. Erskine's Institutes; and the natural strength of the claim is shewn by this, that the widow's service, although posterior to the infestment of a singular successor deriving right from her husband's heir, gives her a preferable right; *Boyd v. Hamilton*, 7th March 1805. Without service the right appears to die with her, for, in *M'Leish v. Rennie*, 21st February 1826, a widow never having served, it was held that her executors could make no claim to terce. The propriety of the decision, however, has been doubted.

KENNING TO
TERCE.
ii. 9, 50.

More's Notes to
Stair, ccxviii.

Lesser terce is that given to a second widow from subjects already charged with terce, and consists of one-third of the remaining two-thirds of the rent.

LESSER TERCE.

The claim is altogether excluded by the marriage being judicially declared void, or by its dissolution within year and day, unless in the latter case the widow be the mother of lawful issue; * *Crawford's Trustees v. Hart's Relict*, 20th January 1802. Delict on the part of the wife, *e.g.*, adultery, also excludes the right.

TERCE, WHEN
EXCLUDED.

M. 12,698.

Although the rents during the subsistence of the marriage fall under the *jus mariti*, the heritage of the wife continues her own property, subject to her disposal, with the consent of the husband, as guardian, to any alienation made *stante matrimonio*. Upon her death the estate descends to her heir-at-law, subject, if there have been issue of the marriage, to the right of *courtesy*. This is a right peculiar to the laws of Scotland and England. In the former it is called *Curialitas Scotica*, and derives its name of courtesy from the French, in token of its character as an arrangement of gentle consideration towards husbands, upon whom it bestows the enjoyment of their deceased wives' whole heritable estate in liferent, provided there was

2. LEGAL DIS-
POSITION OF THE
WIFE'S HERITA-
BLE ESTATE.

COURTESY.

* Now, by 18 Vict. c. 83, § 7, where a marriage is dissolved before the lapse of a year and day from its date, by the death of one of the spouses, the whole rights of the survivors and of the representatives of the predeceaser are the same as if the marriage had subsisted for year and day.

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WIFE'S INFEFT-
MENT THE MEAS-
URE OF THE
COURTESY.

COURTESY
VESTS WITHOUT
SERVICE.

a living child heard to cry. That child must have been the wife's heir, there being no room for courtesy, if the wife either have no child at all, or have a living child of a prior marriage. Thus, if no child exist, there is no courtesy; but, if there be a living child heard to cry, then the claim is established, though the child do not live an hour. It is given to the husband as father of an heir. The courtesy extends to all the heritage in which the wife died infeft, having obtained it by succession. Her lands acquired by purchase or other singular title are not subject to courtesy, but it extends to burgage property which is inherited. It is affected, like terce, by all real burdens.

No service is requisite here. The right is established *ipso jure* by the wife's death, and is exercised by a continuation of the administration, which during the marriage the husband exercised *jure mariti*. The courtesy is also a right strictly personal, and is held to be renounced by the husband's failure to levy the rents, his executors having no claim where he has not himself exercised the privilege.

These rights of terce and courtesy, together with the legal rules of succession, as well as the power of disposal of their heritable properties, constitute the legal distribution, or faculty of distribution, of the heritage of the parties, if there be no conventional arrangement; and the purpose of the contract of marriage, in so far as regards this class of rights, is to modify or control the disposition of the law which we have now described. The portions of the marriage contract, therefore, which call for our attention at this time, are those which relate to the settlement of the heritable property belonging to the spouses, as regards the interest of themselves respectively, and also as regards the issue of the marriage. The provisions used to regulate these interests will appear from an examination of the leading clauses in the ordinary form of the contract, which is given in the Juridical Styles.

i. 174, 3^d Ed^o.

STYLE-OF THE
CONTRACT.

(a.) DISPOSITION
OF HUSBAND'S
ESTATE.

After the ordinary introduction, which has already been referred to in examining the contract relating to moveable rights, there is a dispositive clause containing the settlement of the husband's heritable estate. This is made in contemplation of the marriage, and in consideration of the provisions in his favour. These words, and, independently of them, the fact of the marriage itself, distinguish this settlement, in so far as it may give rights after the granter's death, from that by a private *mortis causâ* disposition. The latter is voluntary and revocable; but the settlement in a marriage contract is onerous, not expressing the mere will of the party, but his part of a mutual contract, which, being the result of considerations upon both sides, is onerous in the highest degree.

It is also to be remarked *in limine*, that the transference of a land estate by marriage contract is made by precisely the same feudal

rules as in any other conveyance. If it is to operate as a transmission, there must be words of *de præsenti* disposition, and, in order to make it effectual as a medium of divesting the granter, and creating a new investiture according to the destination in the contract, there must be the same warrants, viz., a procuratory to resign and precept of sasine. Many contracts, however, are not intended to operate as actual feudal transmissions of the estate, but only to fix the measure of the interests of the different parties, without providing the means of converting these interests immediately into real rights. In this case, the contract operates as an obligation upon the granter, upon which action will lie for implement. This is a distinction very necessary to be borne in mind, in order to determine the effect of marriage contracts, viz., whether they are designed to operate as actual transmissions, and contain warrants of infestment, to be used now or afterwards, whereby the fee may be conveyed out of the granter and vested in terms of the destination—or whether, on the other hand, they are designed merely to ascertain the interests which different parties are to have in the estate, but without actually transmitting it, so that the fee remains vested in the granter, and those acquiring rights under the contract have merely a claim against the granter as a debtor in the obligation, and cannot convert their claim into a real right without obtaining supplementary deeds in implement or a judicial sentence.

When the proprietor of an heritable estate transmitted by the contract is not infest, he will grant an obligation to complete his titles with a view to the transmission being perfected by accretion, according to the rules which we have already ascertained.

In the form we are examining, the husband gives a complete feudal conveyance disposing the lands to himself and the heirs male of this marriage; whom failing, to the heirs male of his body in any subsequent marriage; whom failing, to the heirs female of this, or any subsequent marriage; whom failing, to any other heirs agreed upon; and, failing all these, then to the granter, his nearest lawful heirs and assignees whomsoever, the eldest heir female throughout the whole course of the succession excluding heirs portioners, and succeeding always without division. According to this destination, if there shall be sons of the marriage, the eldest will take the whole estate as heir of the marriage and of provision under the contract. If there are daughters and no sons, then, in the absence of the exclusion contained in this style, the whole daughters would receive the estate as heirs portioners of provision. The exclusion makes it descend to the eldest alone.

DESTINATION
TO HEIRS-MALE,
&c.

For the reasons already stated, the heir of the marriage, called by such a settlement, is in a more favourable position than the heir in a voluntary settlement, because his right stands upon an onerous deed, for which a consideration has been granted. Besides the charac-

HEIR IS quo-
dammodo cre-
ditor.

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HEIR CAN REDUCE GRATUITOUS DEED TO HER PREJUDICE.

M. 13,010.

2 S. 612.

FEE REMAINS IN FATHER.

M. 13,040.

15 S. 999.

HEIR CANNOT PROTECT HIS *spes successionis* BY DILIGENCE.

M. 4398.

Cr. and St. App. 493.

ter of heir, therefore, the party thus called has, to a certain extent, the character also of his father's creditor, but subject to the modifications and rules which we shall afterwards explain; and the character of creditor prevails absolutely to this extent, that the father lies under an implied obligation not to defeat the destination in the marriage contract by a gratuitous deed; *Graham v. Coltrain*, 9th June 1743. There, a husband, having by his marriage contract provided all he had or should acquire to the heirs of the marriage in fee, afterwards made an entail excluding the heirs of the marriage. It was reduced as *contra fidem tabularum nuptialium*; and, in *Ewen or Grahame v. Ewen's Trustees*, 15th January 1824, there will be found another example of reduction obtained by the heir of the marriage of gratuitous deeds granted to his prejudice. This is a remedy granted to him, not as heir, but as creditor, and he is, therefore, entitled to sue without service. The right of the heir under such a destination, however, is necessarily subject to the fee remaining in the father during his life. The destination, it will be observed, is to the father himself, and to his heirs male of the marriage. The fee is, therefore, by express terms conveyed to the father, and, even although the terms used had been to the father in liferent and the heirs of the marriage in fee, the fee would have been held to remain in the father, according to the rule to be afterwards explained. The father's right, therefore, continues to subsist, affected only by the modification that he cannot gratuitously disappoint the heir's hope of succession; and the right of the heir, being merely a hope of succession, is extinguished, if he predecease his father; *Maconochie v. Greenlee*, 12th January 1780. Heritable subjects were here provided by marriage contract to the husband and wife in conjunct fee and liferent, and to the heirs of the marriage in fee. There was an only daughter who survived her mother, but died before her father, having previously assigned her right under the contract. It was found that she had merely a hope of succession, and no *jus crediti*, and that her assignation carried nothing. The doctrine is clearly exhibited in *Brownings v. Hamilton*, 25th May 1837. In the words of Lord COREHOUSE, the children of a marriage whose right stands merely upon a destination are "creditors among heirs, but they are only heirs among creditors." The right of the heir, therefore, as it imports no proper *jus crediti*, cannot be protected by diligence; *Gordon v. Sutherland*, 3d June 1748. Here a marriage contract contained an obligation to infest the spouse in liferent, and the heir male of the marriage in fee. The heir having used inhibition to restrain the father from acts prejudicial to his rights under the contract, that diligence was found to be incompetent, inasmuch as, although inhibition is effectual to secure a valid obligation, it can have no effect to extend or make valid an imperfect obligation. This decision was affirmed on appeal. The father, there-

fore, may sell the estate, and is not bound to re-invest the price; *Cunynghame v. Cunynghame*, 17th January 1804. The father is thus understood to reserve to himself the fee, with the power of burdening and of alienation, and the heir's *jus crediti* does not attain its full effect until the father's death. Upon that event he becomes a creditor, although the estate has been sold, his claim being limited to the price actually got, and not extending to the sum which the lands would have brought at the father's death, or to the lands bought with the price; *Earl of Wemyss v. Earl of Haddington, &c.*, 28th February 1815.

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M. 12,029.
FATHER MAY
SELL.

The modified right in the heir which restricts the parent's gratuitous acts is confined to the issue of the marriage, and the destination is purely gratuitous as regards all substitutes called after the children; *Craik v. Craik*, 29th January 1735. Here, a substitution in a marriage contract was held not to defeat a previous destination so framed as to be effectual against gratuitous deeds. The same principle is distinctly illustrated in *Reid or Wilson v. Reid*, 4th December 1827, where the fee of a subject belonging to the wife was first given to the heirs of the marriage, and, failing them, one-half to the wife's heirs, and one-half to the husband's. It was held, that, in so far as regarded heirs of the marriage, the deed was onerous, and gave them a *jus crediti*, but that, with respect to heirs whatsoever, it was a *mortis causâ* deed merely, giving a *spes successionis* but no vested right, so that, although the parents were pointedly restricted to a liferent, the fee remained in the wife as regarded the heirs called after the heirs of the marriage. In *Craigie v. Gordon*, 17th June 1833, there will be found a marriage trust terminated at the instance of the heir of the marriage in disregard of ulterior destinies. The restriction against gratuitous acts is also confined to the father, and does not extend to the heir. When the heir has once succeeded the contract is fulfilled, and he is absolute fiar, and may alter the order of succession as he chooses; so, where the destination was to heirs male of a first marriage, whom failing, to heirs male of a second marriage, whom failing, to heirs female of the first marriage, and, there being no son of the first marriage, the heir of the second took the estate; he was found entitled to alter the order of succession, so as to disappoint the heir female of the first marriage; *Edgar v. Johnston*, 6th July 1736. The calling of the heir of the marriage gives him a right which the father cannot defeat gratuitously, even although the son become bankrupt; *Spiers v. Dunlop*, 28th July 1778; nor will the insanity of the heir give the father power to prevent his succession under such a destination. The terms of a clause, framed to prevent the consequences of such a contingency, will be found in the Juridical Styles.

DESTINATION
GRATUITOUS
quoad SUBSTITUTES AFTER
CHILDREN.
M. 4313.

6 S. 198.

15 S. 1157.

HEIR'S FEE IS
UNLIMITED
AFTER SUCCESSION.

M. 4325.

M. 13,026.

i. 196,

3^d Edition.

Mr. Erskine holds, that, notwithstanding a destination to heirs male in an antenuptial contract, the father has power to affect the

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M. 12,984.

FATHER'S
POWER TO AF-
FECT THE SUC-
CESSION WITH
REASONABLE RE-
STRICTIONS.

M. voce "Pro-
" vision to
" Heirs and
" Children,"
App^x. No. 4.

M. voce "Fiar
" absolute,"
App^x. No. 1.

Hume, 531.

4 S. 393.

HEIR OF MAR-
RIAGE CANNOT
COMPETE WITH
FATHER'S
CREDITORS.

M. 12,941.

MODE OF BE-
STOWING FULL
jus crediti
UPON HEIRS OF
THE MARRIAGE.

succession with reasonable restrictions directed to the object of preserving the family ; and, in the early case of *Craik v. Craik*, 7th December 1728, the estate having been settled by marriage contract upon heirs male, in terms importing an absolute and unrestricted fee to the heir, a subsequent deed was sustained, whereby the father regulated the ulterior succession, so as to substitute his own daughter after the son in preference to the son's daughter. There is now, however, a series of decisions, by which it is established, that full effect must be given to the onerous obligation in the marriage contract, and that the parent is not entitled, after having provided an unrestricted fee thereby, subsequently to affect the right by limitations and fetters ; *Watson v. Pyot*, 28th January 1801. Here the father was found not entitled to entail lands settled upon the heirs of the marriage. In *Douglas v. Johnston*, 5th December 1804, a father, having settled his estate in his daughter's marriage contract on a certain series of heirs, was found not entitled to impose additional restrictions by a subsequent deed, although he did not thereby vary the order of succession. In *Ormistons v. Ormistons*, 24th January 1809, the father, after making provision of heritable conquest to children of the marriage, on the ground of displeasure with his daughter's marriage restricted her to an annuity, and disposed the property to her children ; but the Lords held, that such a gratuitous and arbitrary settlement could not be sustained, and that the interest of the daughter as heir of the marriage must prevail. It is also settled, that, when the contract specifies conditions or restrictions under which the settlement is made, the parent cannot subsequently add other restrictions not contained in the contract ; *M'Neil v. M'Neil's Trustees*, 27th January 1826.

It follows from the father's reserved right of fee giving him power to burden and alienate, that the heir's right under the contract cannot compete with the claims of the father's creditors. He is restrained from gratuitous deeds, but, as he continues in other respects unlimited fiar, the property is liable for his debts and deeds, and the heir, under such a destination as we are considering, cannot either claim a preference over, or compete with, any creditor of the father, excepting those only who stand in the position of debtors to the heir himself. Such are cautioners for implement of the provisions of the contract, who are not entitled to object to the heirs' right, upon the ground that, as they will represent the father, they will be liable in relief of the cautionary obligation ; *Fotheringham v. Fotheringham*, 5th December 1734.

How, then, can the parent bestow upon the heir of the marriage a proper right of credit, and a fee of the estate ? Mr. Erskine points out three modes in which this may be done :—1. By the father binding himself not to contract debt. 2. By his obliging himself to infeft the heir in the lands on or before a day named, or when the heir shall

have attained a specified age—and, 3. By his restricting himself to a liferent of the estate. The second method, viz., by infeftment in the lands within a certain time, is effectual upon the same principle on which money provisions in a marriage contract confer a *jus crediti*, if made payable at a time which may arrive during the father's life. The restriction to a liferent can only be effected in moveable rights through the medium of a trust; in heritable rights it will take effect by registration of the sasine by which the rights created under the contract are completed. Obligations of the nature now referred to are immediately prestable, and form the ground of diligence; *Douglas v. Douglas*, 22d July 1724. The husband here bound himself in the marriage contract to infeft himself before a precise day, and, being so infeft, immediately thereafter to resign for new infeftment to his spouse in liferent and the heirs of the marriage in fee. It was found, that he could not grant any voluntary deed inconsistent with this settlement, and that inhibition at his son's instance, in order to enforce its provisions in his favour, was effectual.

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The obligation not to contract debt, or to infeft the heir, or to restrict the parent to a liferent, may be made effectual also by sasine. Without sasine, although the heir has a *jus crediti*, and may, therefore, compete with creditors, and be ranked *pari passu* with them, it is evident, that he can have no preference over other creditors, because he has not obtained a real right, which is necessary to give a preference. He only possesses before infeftment the power to obtain or to enforce a real right. Of this there is a strong illustration in *Falconer v. Wright*, 22d January 1824. Here, the husband, being infeft in the lands, disposed by marriage contract to himself in liferent for his life-rent use allenary, (terms absolutely exclusive of a right of fee remaining in the father,) and to the bairns of the marriage in fee; infeftment passed only in favour of himself in liferent allenary upon the precept in the contract, but there was no infeftment in favour of the only child. Here it is clear, therefore, that the real right of fee remained vested in the father by virtue of his original infeftment prior to the marriage, and that the fee in favour of the child stood only upon the personal right created by the conveyance in the contract. The Court, accordingly, held, that although the intention was clear to give a fee to the child, that had never been effectually done, but that the fee remained vested in the father by his original title, and that it had been effectually conveyed by a trust-disposition which he had granted for behoof of his creditors after the dissolution of the marriage. This case should be carefully compared with that of *Newlands v. Newlands' Creditors*, 9th July 1794. This is a leading authority, and was affirmed in the House of Lords, 26th April 1798, but with considerable hesitation on the part of the Lord Chancellor LOUGHBOROUGH. It was not the case of a marriage contract, but of a disposition by a

HEIR'S RIGHTS
MADE PREFER-
ABLE BY SASINE.

2 S. 633; 3 Ross,
L. C. 662.

M. 4289; 3 Ross,
L. C. 634.

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party to his natural son, fortified by a gift from the Crown as *ultimus hæres*, of lands in favour of the disponent in liferent allenary, and of the lawful heirs of his body in fee. This destination by force of the word *allenary* restricted the right of the disponent to a liferent merely, and a competition having arisen between his creditors and his heir, it was found, that the fee belonged exclusively to the heir. There does not appear from the report to have been any infestment, and if, therefore, the disponent had had a previous title by infestment, as in the case of *Falconer*, there can be no doubt that the creditors would have prevailed by attaching the real right, which must have been preferred to the heir's personal right; but, the disposition being his only title, there was no room to presume a fee reserved by him, and the fee, therefore, was found not attachable for his debts. Where

FIDUCIARY FEE.

the destination is to the father in liferent for his liferent use allenary, and to the children *nascituri* in fee, infestment in these precise terms makes the fee in the father fiduciary for the children. See the opinions of the Judges in *Houlditch v. Spalding*, 9th June 1847. It is very uncertain, however, what precise powers are competent to a fiduciary fiar so constituted. In *Emslie v. Fraser*, 13th February 1850, there was some discussion on this point. Here, the liferenter's infestment made no mention of the fiars, and, an action of declarator of marches having been instituted by the liferenter, it was found incompetent after his death to transfer that action against the fiar. When the infestment does not include the fee of the children *nascituri*, their right is not made real, and they can rank only as creditors by virtue of their personal right to the fee; *Dundas v. Lord Dundas*, 23d January 1823; *Falconar v. Moncrieff*, 20th June 1825.

It will, of course, be understood, that, even when infestment does pass in favour of the children, no preference is thereby conferred upon them, unless by the destination they are preferable; *Fulton v. King*, January 1811. Here, there was a conveyance by the father to himself in liferent, and to the children in fee, and sasine followed in these terms. It was pleaded, that the father being bound absolutely to warrant the disposition to the children, their right of fee was thereby guarded. But it was held, that, though the right was guarded, it was not amplified beyond the terms of destination, which by established construction imported a hope of succession only, not liable to disappointment by gratuitous deeds, but subject to the father's power of onerous disposal.

(b.) SETTLEMENT OF WIFE'S ESTATE.

The settlement of the wife's heritable estate is regulated generally by the same principles, but with this exception, that, when her heritable estate is contributed *nomine dotis*, and settled upon the spouses and the heirs of the marriage in fee, without any ulterior destination to the wife's heirs, the fee is held to be in the husband; *Watson v.*

Johnston, 26th July 1766. Here, the wife's property was disposed in favour of her husband and herself in conjunct fee and liferent, and to the heirs of the marriage in fee, and the fee was held to be in the husband. But this effect is prevented, as we shall afterwards see, if the interest of the husband, or of both spouses, be limited to a liferent merely, the presumption being thus excluded that it was intended to divest the wife of the fee.

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The settlement of the wife's heritable estate is contained in the subsequent part of the contract, but, as its construction is regulated generally by the same principles as that of the husband, it will be attended with convenience to advert here to the rules by which in general provisions of fee and liferent are regulated, whether occurring in marriage contracts, or in other deeds of settlement.

Fee and liferent.—The *fee* of a property is its substance—the thing itself in its entire being and extent—and the right to the fee implies, in the absence of special restriction, the power of absolute control and disposal. *Liferent*, again, is the usufruct merely—that is, a right to the fruits or produce during life. The fee of land, therefore, is a right to the land itself, with power not only to reap the fruits, but to burden and sell at pleasure. The liferent of lands, again, is a right only to enjoy the produce, consisting either in the actual crops, or in the rents; and liferents generally must be exercised *salvâ rei substantiâ*—that is, without encroaching upon the substance of the property or fee.

The rules by which destinations of fee and liferent to strangers are construed are shortly these, viz. :—

CONSTRUCTION
OF DESTINA-
TIONS OF FEE
AND LIFERENT
TO STRANGERS.

A conveyance to two strangers in conjunct fee, or to two jointly, and their heirs, gives the equal enjoyment of the subject *pro indiviso* to both, and, when either dies, his heirs take his *pro indiviso* share.

If the grant be to two strangers in conjunct fee and liferent, and their heirs, the introduction of the word *liferent* gives a liferent of the whole to the survivor, at whose death the fee is divided between the heirs of both.

When the destination is to two persons, and the longest liver, and their heirs, upon the death of one the fee of the whole accrues to the survivor, and the words "*their heirs*" are construed to mean the heirs of the survivor, to whom alone the fee descends; *Bissett v. Walkers*, 26th November 1799.

M. voce "Death-
bed," App.
No. 2.

Should the right be taken to two persons and the heirs of one of them, the fee belongs to him whose heirs are called, and the right of the other resolves into a liferent.

These rules, although applicable in some measure to destinations in favour of parents and children, whether in marriage contracts or other settlements, are subject to certain general considerations result-

CONSTRUCTION,
WHEN PARTIES
IN RELATION OF
PARENT AND
CHILD.

PART III. ing from the relation of the parties. Of these we shall shortly notice the chief :—

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**FEE CANNOT BE
in pendente.**

As nature abhors a *vacuum*, so the Law will not permit the non-existence of a fee—that is, the right to the substance of the property with the powers of a *fiar* is not allowed to be *in pendente*, and is construed either to remain with the disponent, if he have not clearly divested himself ; or, if there be no room for such a construction, and the disponent be undoubtedly divested, then the fee is in the party to whom it is expressly destined ; or, if that supposition be excluded by the terms of the destination, as, for instance, when the fee is bestowed upon children not yet born, then the fee is construed to be in the parent, although the *liferent* only be bestowed on him, and, if his right be strictly limited to a *liferent*, as by the addition of the word *allenary* or *only*, he is, notwithstanding, accounted to be *fiar*, but that only in trust for behoof of the children. See the cases of *Houlditch*, and of *Falconar*, already cited.

9 D. 1204.
2 S. 633.

**PARENT NOT
PRESUMED TO
DIVEST HIMSELF
OF FEE.**

As a general principle it may be stated, that, when a parent is the disponent, it is not readily presumed that he intends to divest himself of the fee. The natural presumption is, that he intends to retain the character and rights of proprietor, and that, in so far as regards his children, the settlement is made in the contemplation of death, and designed, therefore, to confer rights which will not become perfect until that event shall happen.

**FEE NOT PRE-
SUMED GIVEN TO
HEIRS *nascituri*.**

Another principle to be kept in view is, that, when the destination is to heirs not yet born, the law is reluctant to conclude that the intention was to give a fee to such future heirs. It is of the genius of our law, as shewn by the precision required in going back to the vassal last seised, that the fee of property should not be in suspense ; and, therefore, although children *nascituri* have a fee conferred upon them *ex figurâ verborum*, no such absolute right is in reality bestowed, unless the terms used be such as clearly to establish the intention to do so, and, in the case of a parent, to divest the granter himself.

**PRESUMPTIONS
AS TO FEE IN
QUESTIONS BE-
TWEEN PARENT
AND CHILD :—**

**1. PRESUMPTION
FROM SOURCE OF
PROPERTY.**

It is sometimes difficult to determine in cases of this description where the fee really is, and, in order to solve such questions, recourse is had to certain presumptions arising out of the circumstances :—

(1.) Of these presumptions one is the source of the property—that is, whether it is derived from one of the parties to the contract, in which event the construction is aided by a reference to the general improbability that the proprietor intended to denude himself. The source of the property, therefore, is a chief element in determining where the fee is, if the terms used leave any doubt.

**2. FROM POWER
OF DISPOSAL.**

(2.) Another presumption is raised by marking, whether, and upon whom, a power of disposal is conferred ; for a *liferent* with the power of disposal is in the main equivalent to a fee.

**3. FROM HEIRS
CALLED AFTER
HEIRS OF MAR-
RIAGE.**

(3.) A third index is derived from observing whose heirs are first

called after the heirs of the marriage; for it is a natural conclusion that the fee is in the party whose heirs (failing issue of the marriage) are to inherit the property.

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These various indications, however, and whatever others may be suggested by ingenuity of construction, must all bend to the terms actually employed, when these are quite explicit and admit of no doubt. Marriage contracts especially are onerous deeds, and the intention of the parties, as declared by the words used, must rule, and will not yield to presumption, however strong, to which the words employed are manifestly opposed.

In marriage contracts it is common to make a combined settlement of fee and liferent for regulating the interests of the contracting parties and their issue. These are provisions of conjunct fee and liferent to the parents and to the children, or simply of liferent to the parents, and fee to the children; in regard to which this general rule is to be observed, viz., that, although the estate provided to the parent be a liferent, the fee is, notwithstanding, still vested in him, unless terms are used, so express as to exclude the possibility of such having been the intention, as, for example, if the word *allenarly* be used, (as in the case of *Newlands, supra*,) or the word *only*, that excludes the parent from a fee in his own right.

PROVISIONS OF
LIFERENT TO
PARENTS AND
FEE TO CHILD-
REN, IN MAR-
RIAGE CON-
TRACTS.

The principles now stated are amply exhibited in the authorities; and we shall cite only a select number illustrative of the different positions. In many of the cases various presumptions are found in combination, while in others the decision has depended chiefly upon the weight given to some one or other of them. The following decisions are arranged under the principles which appear to have formed respectively main elements in the judgment. We begin with those in which the fee has been determined by a reference to the source of the property. In *Cuthbertson v. Thomson*, 1st March 1781, it was decided that a disposition of heritable subjects by a father to his daughter in liferent, and her children, procreated and to be procreated, in fee, gives the fee to the mother of the children. In *Creditors of Robertson v. Mason's Disponees*, 9th December 1795, a disposition by a father to his daughter and her husband, their heirs, executors, and assignees whatsoever, was held to vest the fee in the wife. In another case, the wife by her marriage contract, in the event of her succeeding to certain lands, and under reservation of her own and her husband's liferent right, disposed these lands to the heir-male of the marriage. This destination was held also to give the fee to the wife; *Dewar v. Campbell or Mackinnon*, 5th May 1825. In deciding this case the Lord Chancellor stated it to be universally held as the law of Scotland, that, where a land estate is settled upon a parent in liferent and his children *nascituri* in fee, the fee must of necessity be in the parent—a necessity arising from this principle, that a fee cannot be in

EXAMPLES OF
FEE BEING DE-
TERMINED BY
REFERENCE TO
SOURCE OF THE
PROPERTY.
M. 4279.

M. 4491.

1 Wil. & Sh.
App. 161.

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- 2 S. 617. *pendente*, although, if the right of liferent is qualified by the terms *alienably* or *only*, the parent's right is reduced to a liferent or fiduciary fee. Upon the same principle, in *Muirhead or Paterson v. Paterson*, 16th January 1824, a wife having disposed heritable property to her husband and herself in conjunct fee and liferent, and to their children, whom failing, their heirs in fee, the fee was held to remain in the wife. The case of *Fraser v. Brown*, 27th March 1707, is yet stronger. Here, in a postnuptial contract the wife disposed her lands to the husband in liferent, and the heirs procreated and to be procreated of the marriage, whom failing, to the husband his heirs or assignees, in fee, heritably and irredeemably, reserving her own liferent. Here, the husband, in a question at the instance of his creditors with his widow and children, was held to have been liferenter only. The ultimate destination to him in fee gave only a *spes successionis*, being a substitution after the heirs of the marriage. His immediate right was a liferent; and it was held, that there is no presumed intention immediately to denude, when a spouse is the disponent. The presumption, therefore, in such deeds is for the natural meaning of the word *liferent*. The presumption is different, when the conveyance comes from a third party, in which case there can be no doubt of the intention immediately to divest, and so, to prevent the fee from being *in pendente*, it is held to go to the parent to whom the liferent is given, of which we have a precise example in the case of *Cuthbertson*, already cited. The case of *Mackellar v. Marquis*, 4th December 1840, is to the same effect as the case of *Fraser*, last quoted.
- M. 4259.
- 3 D. 172.

EXAMPLES OF
POWER OF
FIAR BESTOWED
ON NOMINAL
LIFERENTER.
F. C.

We have an example of the powers of fiar being bestowed on the nominal liferenter in the case of *Baillie v. Clark*, 23d February 1809. Here, the title to a property was taken to a father in liferent, and to his son *nominatim* in fee—a settlement which, in the ordinary case, would have determined the fee to belong to the son; but the destination was subject to this reservation, that the father should have power to burden, sell, and dispose of, the property at pleasure without the son's consent. The Court held that this reservation clearly made the father fiar.

EXAMPLES OF
FEE BEING DE-
TERMINED BY
ULTERIOR DESTI-
NATION OF
PROPERTY.

M. voce "Pro-
" vision to
" Heirs," &c.
App^x. No. 6.

An example of the ulterior destination of the property determining in whom the fee is, will be found in the case of *Pollocks v. Pollock*, 4th July 1806. There, a property was disposed by a father to his daughter and her husband in conjunct fee and liferent, and to the children procreated and to be procreated, whom failing, to the wife and her heirs and assignees in fee, and the survivor of the spouses was expressly restricted to a limited liferent. An action having been brought by two of the children to have the mother, who survived, ordained to give up possession, the Court held, that the fee was in the mother, and that the restriction of the liferent to the surviving parent, which the deed expressly stated to be in order that the remainder might go to the subsistence of the children, conferred no right of fee upon any particular child.

We have also examples of the fee being determined by the force of the expressions used in a disposition by the husband in a marriage contract in favour of himself and his wife in conjunct liferent, and the longest liver of them, and their heirs and assignees, in fee. In *Forrester and Macgregor v. Forrester's Trustees*, 13th April 1835, this destination was held to give the fee to the surviving wife, following the authority of *Fergusson v. M'George*, 22d June 1739, where a bond to a husband and wife, and the longest liver of them and their heirs, was also held to carry the fee to the surviving wife. In these two cases it is to be observed that there was no destination to the heirs of the marriage prior to the calling of the spouses and their heirs. When the heirs of the marriage are called, that affords a presumption against the husband's intention to give a fee to the surviving wife; and, therefore, where the disposition was to the husband and wife, and to the longest liver of them two, in conjunct fee and liferent, and to the heirs of the marriage, whom failing, to his and her heirs equally between them, the wife having survived was found to have right only to half of the fee; *Madden v. Currie's Trustees*, 22d February 1842.

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1 Sh. and M'L.
App. 441;
3 Ross, L. C.
733.
M. 4202.

In examining the contract of marriage in connexion with the moveable rights of the parties, we had occasion to observe, that the right of a substitute in a legacy—that is, of one appointed to enjoy the bequest after it shall have been enjoyed by a prior legatee—may be effectually protected by the appointment of trustees in whom the sum shall be vested. The constitution of a trust is an effectual means also of securing the interest of heirs and substitutes upon whom heritable property is settled by marriage-contract, excepting in so far as the effect of such trusts is now limited by § 47 of the Entail Amendment Act, by which any party born after the date of a trust-deed limiting his right is entitled to become fee-simple proprietor. The efficacy of a trust in securing the fee of heritable subjects to children of the marriage is shewn by *Ewan v. Watt*, 10th July 1828, where there was a *mortis causâ* deed conveying the testator's whole heritable and moveable property to trustees, with instructions to invest, for behoof of the testator's son and the son's wife for the liferent use of the interest, the fee being bestowed on their children. Although the trustees named did not accept, the fee was found to belong to the children, because of the existence of a trust, and of the testator's manifest intention. It will be advantageous to compare this case with *Williamson v. Cochrane*, 28th June 1828, which was the bequest of a sum of money to a daughter in liferent, and to the child or children of her body in fee—a destination which, in the absence of a trust, was held to give the fee to the parent.

TRUST EFFECTUALLY SECURES INTEREST OF HEIRS AND SUBSTITUTES.

6 S. 1125.

6 S. 1035.

Already, also, we have had occasion to remark incidentally, that

Nominatim FIARS.

- PART III. the fee is effectually bestowed when the fiar is expressly named ; and
 CHAPTER III. this rule holds, even when the person named is a child, and the
 F. C. ; 3 Ross, parent's liferent not strictly limited. Of this there is an example in
 L. C. 708. the very instructive report of *Mackintosh v. Mackintosh*, 28th January
 F. C. 1812 ; and also in *Dykes and Boyd v. Boyds*, 3d June 1813. But,
 although the son named be described as fiar, no fee vests in him
 immediately, if the previous part of the destination imports the con-
 tinuance of a fee in the father ; *Wilson v. Glen*, 14th December 1819.
 F. C. ; 3 Ross, There was there a conveyance to the husband and wife and longest
 L. C. 716. liver in conjunct fee and liferent for the wife's liferent use allenary,
 and to their son *nominatim* in fee. Infestment passed in favour of
 all the parties in these terms. It was held, that there was no fee in
 the son.
- 10 D. 1385. The extent of the wife's right under a destination limiting her to a
 liferent is clearly brought out in *Gordon v. Baddon*, 22 June 1848.
 Here the husband and wife were infest under a destination to them
 in conjunct fee and liferent, for her liferent use allenary, and to
 the heirs and assignees of the husband in fee. It was held, that this
 gave the wife a liferent only, contingent upon her survivance of her
 husband, and that she could not compete with her husband's creditors
 during his life, but was entitled to have her right of liferent reserved
 to take effect in the event of her survivance.
- DESTINATION OF WHOLE PRO- When the whole property is settled by one comprehensive expres-
 PERTY, HERI- sion, the effect depends upon the particular terms used. A convey-
 TABLE AND ance of the whole heritable and moveable property to the heirs of the
 MOVEABLE, TO marriage leaves the rule of law undisturbed, the word *heirs* being
 HEIRS OF THE flexible, so that the heritable property descends to the heir-at-law, and
 MARRIAGE. the moveable estate is equally divided amongst the other children or
 executors. A sum of money, therefore, provided to the heirs, divides
 M. 12,844. equally among the children ; *Macdoul v. Macdoul*, February 1727.
 A partner's share stipulated to " belong to his *heir*" after his death,
 13 D. 1367. goes to his executor as heir *in mobilibus* ; *Irvine v. Irvine*, 15th July
 1851. On the other hand, when a provision heritably secured was
 given to a daughter, and the heirs of her body, it was held to descend
 to her heir-at-law, as the heir in heritage, although bearing to be de-
 signed for the support and maintenance of A, and the children she
 might have ; *Bowie v. Bowie*, 23d February 1809. The same rule pre-
 vails, when the destination is not to heirs simply, but to the *heirs*
 F. C. and *bairns* of the marriage. In *Fairservice v. White*, 17th June
 1789, lands destined to heirs and bairns were found to belong to the
 oldest son.
- DESTINATION TO HEIRS AND Exception in
 BAIKNS. case of bur-
 M. 2317. gage subjects.
- In small subjects, however, especially burgage, and where the cir-
 cumstances exclude the idea of keeping up a family estate, the rule
 yields to construction, and will not prevent effect being given to the
 manifest intention of the parent clearly expressed. So, where bur-

gage subjects of small value were settled upon heirs, but other clauses shewed that the intention of this settlement was to provide for the bairns, the destination was held to give an interest to all the children; *Watson v. Scott's Younger Children*, 13th June 1760; and, *M. 985.* in such circumstances, where the destination is to heirs and bairns, there is implied a power of division to the father; *Lamond v. Lamond*, *M. 12,991.* 30th July 1776. The correct import of this decision is given by Lord HAILES.

But, when the settlement is in favour of the *bairns* of the marriage, without using the word *heirs*, the children are entitled to succeed in equal shares even to heritage so settled; *Carnegie v. Clark*, 13th February 1677. The principle received effect in *Jardine v. Jardine*, 22d January 1850, where the provision was of the father's whole property, heritable and moveable, to the child or children of the marriage. This was held a disposal of his whole succession to the exclusion of the heir. A power of division was reserved; and lands purchased during the marriage having been taken to the father and his heirs and assignees, it was maintained that this was an exercise of the power of division in favour of the eldest son as heir-at-law. But the Court rejected that interpretation, holding that the father was bound by the terms of the contract, according to the principle expressed by Mr. Erskine, that a destination once made is not easily presumed to be altered or innovated.

We have seen that the heir of a marriage is *quodammodo* creditor of his father, under the destination in his favour in a marriage contract. Although this right does not become complete during the parents' life, it confers, nevertheless, such an interest as can be effectually discharged and renounced by the heir; and the renunciation is valid, and retains its effect, although the child shall predecease the parent. The validity of such a discharge was very carefully investigated and discussed in the case of *Routledge v. Carruthers*, first decided by the Court of Session upon 19th May 1812; remitted by the House of Lords, 29th June 1816; adhered to by the Court of Session, *Majendie v. Carruthers*, 16th December 1819; affirmed, 5th June 1820. Here, an only daughter granted to her father a discharge of her claim as heir of the marriage under his marriage contract. At a distance of time the estates settled by the contract were claimed by her descendants, who challenged her discharge as incompetently granted; but it was ultimately sustained as sufficient. An interesting account of this case is contained in the volume of reports published by Mr. Buchanan, Advocate. It is thus settled, that the heir of a marriage can discharge his right, although it cannot be effectually assigned during the parents' life, as we have already seen in the case of *Maconochie*.

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DESTINATION
TO BAIRNS OF
THE MARRIAGE,
OR TO CHILD-
REN OF THE
MARRIAGE.
M. 12,840.

12 D. 504.

Inst. iii. 8, 88.

HEIR MAY DIS-
CHARGE HIS
RIGHT UNDER
THE CONTRACT.

F. C.

4 Dow's App.
392.

F. C.;
2 Bligh's App.
692.

supra, p. 644.

Conquest, we have already found, comprehends all the property SETTLEMENT
OF CONQUEST.

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F. C. acquired by industry or by other singular title during the marriage, but it does not include what accrues to the parent by succession or legacy; *Rae v. Fraser or Rae*, 23d January 1810. The extent of settlements of conquest, however, depends upon the terms used, being limited by any specific description contained in the deed. Thus, an obligation on the husband to infest his wife in all lands and heritages which he should conquest during the marriage was found restrictable to heritable subjects acquired in property, and not to include leases; *Lady Dunfermling v. The Earl*, 12th March 1628; while, in *Duncan v. Raes*, 15th February 1810, we find leases held to be embraced in a more extensive provision of conquest. There is in the Juridical Styles an example of the settlement of conquest in a marriage contract, given to the wife in security of her provisions, and to the heirs-male of the marriage. A substantial interest, however, may be given to the wife either in liferent or in fee. The style referred to reserves a power of distribution to the father. This, however, is implied in provisions of conquest, but to be exercised in such a manner as not to exclude any child; *Dowie v. Dowie*, 9th January 1728. When the conquest is settled upon the children *nascituri*, in such terms as to give them all an interest, the father cannot disappoint that arrangement by taking the titles of properties acquired in favour of his heirs and assignees; nor can such a destination be construed as an exercise of the power of distribution in favour of the heir-at-law, unless expressly so stated; *Wilson v. Wilson's Creditors*, 14th June 1811.
- M. 3048.
F. C. POWER OF DISTRIBUTION IMPLIED IN PROVISIONS OF CONQUEST.
- M. 13,004. *Jus crediti* OF HEIRS IN REGARD TO CONQUEST. The right conferred upon the children of the marriage by a provision of conquest, is not so strong in its effect as in regard to estates actually settled by the contract. It does bestow a *jus crediti* upon the parent's death, with which gratuitous deeds granted by him cannot compete; *Russel v. Russel*, 9th March 1779. But the children have no power of interference whatsoever during his life in order to make their eventual right secure by ascertaining the amount of conquest at any time; *Lawson v. Kennedy*, 15th February 1694.
- Hume, 534. Provisions of conquest, whether settled upon the heirs, or upon heirs and bairns, or upon the bairns and children of the marriage, are construed by the same rules, as general settlements of heritage in similar terms.
- M. 3072 ;
Hailes, 833. SETTLEMENTS UPON SECOND MARRIAGE.
- 4 Br. Supp.
154. The rule which permits encroachment upon family provisions for the purpose of making a moderate and reasonable settlement upon the wife and children of a subsequent marriage, extends to the heritable estate as well as to moveable property. But, when such posterior provisions are unduly large or otherwise irrational, the Court will reduce the excess; *Dalrymple v. Sinclair*, 23d June 1748; and, in *Wood v. Fairley*, 3d December 1823, the interest of the represen-
- M. 13,035.
F. C. ;
2 S. 649.

tatives of a first wife will be found protected against a settlement upon a second family, while admitting the claim of the widow to a reasonable provision. We had occasion in treating of the marriage-contract under Moveable Rights to point out the difference of opinion which exists amongst lawyers upon the question, whether provisions to any extent can be given to a second wife or family out of property already settled by a prior contract in such terms as to give the first family a proper *jus crediti*. The *dicta* of Erskine upon this point are apparently inconsistent; and the Judges of the First Division were equally divided in the case of *Guthrie v. Cowan*, 21st November 1846.

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Inst. iii. 8,
§§ 40, 42.

9. D. 124.

From the remarks already made, it is clear, that, when the party has any intention to make an entail, or to impose limitations or restrictions upon the heir, power to that effect must be reserved in the contract; and the safe practical rule is to act upon the assumption that no limitation of the heir's right will be permitted which is not specified.

Provisions in favour of the wife.—In the style we are considering the wife is provided for, not under the destination of the heritable estate, but by a liferent annuity to be paid half-yearly; and for her security, the husband obliges himself to infest her in an annuity of the specified amount, to be uplifted from the lands previously conveyed, or from any agreed on portion of them.

LIFERENT
ANNUITY TO
WIDOW.

Instead of a liferent annuity, the widow may have provision made for her by locality—that is, by disposing to her certain specified lands in liferent after her husband's death. By this method her income will necessarily fluctuate, and the rents to which she obtains right will be subject to deduction for public burdens. Undue diminution of her income may be guarded against by specifying a *minimum* annual amount, and obliging the heir to make up that sum annually, when the rental of the locality lands sinks below it. If the value of the lands to be liferented shall depend upon any use which exhausts or encroaches upon the substance, it should be carefully marked, whether the liferenter's enjoyment is or is not to preclude her from such use. In *Eiston v. Eiston*, 10th June 1831, a mother, the original proprietor, having restricted her right strictly to a liferent, and bestowed the fee on her son, was found entitled to continue the working of a quarry; but this decision was opposed to the opinion of eminent lawyers.

PROVISION BY
LOCALITY.

The provision in favour of a wife has this important effect, that it debars her claim of terce. Formerly that legal right arose, although there were a special provision, and the widow got both, until by 1681, cap. 10, upon the ground of the ignorance and inadvertence of writers and notaries inserting provisions without mentioning the terce, whereby

PROVISION TO
WIFE BARS
TERCE.
1681, c. 10.

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M. 4631 ;
M. voce "Fo-
reign," Appx.
No. 5.

F. C.

OBLIGATION TO
INFEST THE
WIFE.

WHERE HUS-
BAND'S RIGHT
PERSONAL.

widows claimed both, it was enacted, that, where a provision is made for the wife by a contract or other deed either before or after marriage, she shall thereby be excluded from the terce, unless it be expressly provided, that she shall have both. The widow still gets both, however, whenever it appears that such was truly the husband's intention; *Ross v. Aglianby*, 20th January 1797; reversed 15th December 1797. In order to exclude all doubt, it is advisable that the terce should be discharged along with the wife's other legal claims; and that is accordingly done by her acceptance of the special provisions, as in full satisfaction of all terce of lands, &c. &c. The wife's acceptance of a special provision, though contained in a foreign deed, bars the claim of terce; *Countess of Findlater v. Earl of Seafield*, 8th February 1814. In this case it was found, that the equitable power of the Court in awarding alimony to widows not provided or imperfectly provided cannot be exercised when there is an antenuptial contract.

By the style under review there are two obligations of infestment granted—one applicable to the settlement of the estate, according to the destination in the contract, upon the husband, and the heirs of the marriage and other substitutes—the other in favour of the wife in security of her annuity. As the new investiture in terms of the settlement of the whole estate may form a part of the titles, there ought to be furnished every feudal means for completing the infestment in accordance with that settlement. The wife's infestment again will form a temporary security only, which will be evacuated by her death, and, although there is no objection to a double manner of holding for the perfecting of her right, and in some circumstances it may be expedient to frame the obligation with two manners of holding, yet in general the object will be effectually secured by infesting the wife base in security of her annuity. The clause of *tenendas*, therefore, which follows the settlement of the estate and of the jointure, and which is expletive of the obligations to infest for these two objects, is divided into two parts, the first referring to the settlement of the estate, and providing for infestment by two holdings, while the second, which is for securing the annuity, is *de me* alone. The procuratory of resignation which follows is, of course, applicable only to the general settlement of the estate. But, if the husband's right be personal, the double manner of holding and procuratory should be extended to the widow's annuity also, and there should be a clause of assignation of writs, which this style does not contain. These would enable the widow, as well as the heir, to obtain a valid infestment by using the procuratory in the husband's disposition.

Jur. Styles, i.
177.

Provisions to younger children.—The provisions in favour of younger children here exemplified are money provisions only, which we have

already discussed in treating of Moveable Rights. It is not uncommon for the husband to oblige himself within a specified time to invest in heritable security a specified sum for behoof of the children. This obligation he can be compelled to fulfil, provided the implement of it does not subject him to serious embarrassment ; *Henderson v. Smith*, M. 6563. 22d February 1750. Such an investment made in name of trustees forms an effectual security in favour of the children, not attachable by creditors.

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PROVISION BY
TRUST IN SECURITY.

The other clauses of the contract, with the exception of the precept of sasine, we have already had occasion to examine.

The right of the wife for her annuity is completed by infestment, which gives her such a real right in the lands covered by the infestment, that they, and their price if sold, must be applied in the first place for payment of her annuity to the exclusion of all other claims not founded on a prior infestment ; *Ross v. Mackenzie*, 11th July 1838. If there be a warrant for infesting trustees in security of the provisions in favour of the wife and children, the infestment of the trustees will make these provisions preferable, if so expressed as to give an immediate *jus crediti*. If a *jus crediti* be given, but no infestment follow, the provisions will compete *pari passu* with the claims of other creditors. Should an immediate right of credit not be conferred, then the effect, whether there be infestment or not, will be regulated by the principles already explained.

EFFECT OF
WIFE'S INFEST-
MENT.

16 S. 1385.

It is unnecessary to enter upon varieties in the form of this important deed, arising from peculiarities in the circumstances or titles of the parties. The principles already exhibited give the essential rules for determining such modifications of style as may be requisite. Of these there will be found various examples in the Juridical Styles.

i. pp. 173-214,
3d Edn.

At page 215 of the Juridical Styles, there is the form of Marriage Articles. These are resorted to, when, from want of time or other causes, a regular contract cannot be prepared. The articles specify in general terms the mutual settlements agreed upon, and bind the parties to execute a full contract with all requisite and formal clauses within a short time specified. Such articles, and the contract following upon them when executed, produce, of course, the same effect as an antenuptial contract, because equally containing conditions antecedent to the marriage, and, therefore, onerous.

MARRIAGE AR-
TICLES.

In conclusion it may be remarked, that while accuracy and precision ought carefully to be studied, this is a deed in which the Court will not allow the plain intention of the parties, fairly deducible from the general nature of the contract, to be defeated by critical objections. The highly onerous character of the mutual considerations

FAVOURABLE
CONSTRUCTION
OF MARRIAGE
CONTRACT PRO-
VISIONS.

- PART III. inductive to the contract of marriage obtain for it, and for those whose
 CHAPTER III. rights depend upon it, a favourable regard and construction. Of this
 16 S. 363. we have two recent examples :—In *Reid v. Young*, 25th January 1838, a marriage contract provided, that, failing children, the free estate on the death of the survivor, calculating the whole as moveable whether heritable or not, should divide into two parts, one for the wife's children of a former marriage, and the other for the husband's. Although there were here no disposing words capable of affecting a feudal transmission of the estate, the Court held, that a clear and valid obligation had been undertaken, to which effect must be given. And, in *M'Gowan v. Jaffray*, 20th July 1842, the wife's whole property being settled by the marriage contract, and the husband's property in ambiguous terms which appeared by a technical construction to limit the disposition on his side to a part only of his property, the Court, upon a view of the general scope and intention of the settlement, held, that it included the husband's whole estate, heritable and moveable, at his death.
- 4 D. 1546.

2. *The Disposition* MORTIS CAUSA.

TESTAMENT IN-
SUFFICIENT TO
CONVEY HERI-
TAGE.

- A proprietor of heritable subjects has unlimited power of alienating them by deeds, of which the effect may either be immediate during his life or suspended until his death ; and, if he is not fettered by an entail, or by conditions otherwise effectually imposed, he may convey to strangers, excluding even his own issue from the succession. Heritage, however, cannot be conveyed by a testamentary deed. In the case of *Montgomerie*, we have already seen, how emphatically the most eminent Lawyers denied the possibility of directing the descent of heritable property by a nomination of heirs. In *Brand v. Brand*, 4th December 1735, the attempt to convey an heritable right by a testamentary deed was found null. The executor was here appointed cessioner and assignee in and to the sum of £500 heritably secured ; but that was decided to be no transmission, there being no *de præ-senti* dispositive words. In like manner an assignment in a testament was found ineffectual to convey a debt secured by adjudication, there being no words of conveyance or description of subjects proper to heritage ; *Galloway*, 12th January 1802. We have already had occasion to remark also that heritage is not carried by a foreign testament, although executed in a country where real property may be so conveyed. Of this there is an example in *Crawfurd's Younger Children v. Crawfurd*, 14th January 1774. The reason is, that a testament is the *suprema voluntas* of the testator—the last expression of his will with respect to the disposal of his property. But that is a mode in which our jurisprudence does not permit heritable property to be transmitted, the law of death-bed being express in annulling any con-
- Bell's Folio Cases, 203 ;
1 Ross, L. C. 7.
M. 15,941.
- M. 15,950.
- M. 4486.

veyance granted within sixty days of death, if the testator at its date laboured under the disease of which he died, and did not afterwards give proof of convalescence by going to kirk or market without support. The distinction, then, between the conveyance of moveables, and that of heritage *mortis causâ*, is this, that the former expressly contemplates the death of the granter, as the condition and term of the grantee's right, while heritage, on the other hand, can only be conveyed, whether the transference is to take effect after death or before it, by a deed *inter vivos*. This is distinctly marked in the case of *Stewart v. Stewart*, 15th November 1803, noticed by Mr. Sandford i. p. 63. in his work on heritable succession. The judgment of the Court was:—"In respect the deed is in the form of a latter will and testament, and leaves and bequeaths the landed estates in certain terms, but contains no proper disposing words, nor is in any respect "a deed *inter vivos*, finds it ineffectual to convey heritage." It is equally futile to attempt to interrupt the legal course of succession by words of disinheritance. *Exhereditation* is not a *nomen juris* by the Law of Scotland; and a writing declaring certain heirs to be disinherited conveys no right to any one; *Stoddart and Riddel v. Thomson*, 5th February 1734. The heir-at-law, therefore, can only be excluded by granting an effectual conveyance to another party.

PART III.
CHAPTER III.

MERE DISIN-
HERITING IN-
SUFFICIENT.

Elchies, voce,
"Succession,"
No. 1.

But, although heritable property cannot be conveyed by a writing merely testamentary, that is only because such a writing does not contain dispositive words. There is no incompetency in combining with a testament a disposition of heritage; and such a conveyance will receive effect, whenever it contains words of transference applicable to the transmission of heritable subjects; *Douglas v. Allan*, M. 15,940. 11th July 1733. But this effect will not follow from the use of the words, "*I give and bequeath*," or, "*I legate*," for these mean, "*I give at my death*;" the terms must be, "*I give, grant, and dispose*," which are effectual to convey any heritable subject clearly comprehended in a general or special description. It does not appear to have been settled that the word *dispose* is indispensable, and the language of Mr. Erskine leaves it uncertain, whether he considered it to be essential. But that word is invariably used, and must, therefore, be regarded by the Conveyancer as the term most to be relied upon. Accordingly, whenever the word *dispose* occurs, it makes an effectual transmission of the heritable subjects named, whether these be specially described or whether they be comprehended under a general description—such as, the whole heritable estate, or the whole heritable property. The usual method of making settlements, therefore, is to have special conveyances of particular estates or subjects, (and it is attended with great practical convenience to have a separate conveyance of each subject,) and, in addition to such special dispositions, a general disposition and settlement, conveying the whole heri-

DISPOSITION
AND TESTAMENT
MAY BE COM-
BINED.

Inst. iii. 8, 20.

PART III.
CHAPTER III.

THE DESCRIPTION
MUST
APPLY TO HERITAGE.

F. C. ; 1 Ross,
L. C. 102.

F. C. ; 1 Ross,
L. C. 98.

table and moveable property which shall belong to the grantor at his death. Such a general disposition will not convey the feudal right to the subjects, unless it contain the proper feudal clauses, nor will it transfer the moveable property like a special assignation, but it gives a clear legal right, capable of being made effectual by action against the heir. The essential points are, therefore, that dispositive words of *de presenti* conveyance be used, and that the description, however general, be inclusive of heritable property. In *Welsh v. Cairnie*, 28th June 1809, the party assigned and disposed "every moveable and immoveable subject" belonging to him, and this was held sufficient to carry a house; and, in *Glover v. Brough*, 7th December 1810, the testator having disposed "every subject, whether heritable or moveable, belonging to him," this was sustained on this ground, as stated by Lord President BLAIR, viz:—"To make a valid settlement of heritage, nothing more is necessary than dispositive words expressing the will of the grantor. This is a general settlement of heritage, to be made effectual by adjudication in implement."

M. 2313.

M. 5440;
Hailes, 332.

M. 15,947.

The words, "all estate, real and personal," are sufficient with dispositive terms to convey the whole heritage and moveables of the grantor; *Drummond v. Drummond*, 17th July 1782. Such general descriptions, however, do not carry subjects, which, according to the ordinary use of the terms employed, cannot be held to be included; and, in *Browns v. Bower, &c.*, 26th January 1770, a disposition of "means and effects, heritable and moveable," was held insufficient to convey a house. It is recognised as a rule, that, when dispositive words are used, the question is, What was the deceased's intention? and, in *Robertson v. Robertson*, 17th June 1785, a conveyance of goods, gear, debts or sums of money, was held to include a debt secured by adjudication.

HEIR NOT
BURDENED WITH
LEGACIES.
F. C.

MODE OF MAK-
ING LEGACIES
EFFECTUAL
AGAINST THE
HEIR.

As heritage cannot be conveyed, so neither can it be burdened with legacies, by a testament to the heir; *Govan v. Setons*, 28th January 1812. When legacies or provisions are intended to burden the heir, they must be constituted in a form not testamentary. Bonds of provision will produce this effect, the heir being bound by his ancestor's obligations, unless entitled, as under an entail, to take the lands free of his predecessor's debts. Another mode is to make a special disposition in favour of the heir, and to charge the provisions as real burdens affecting the land. The manner of constituting real burdens we shall afterwards examine. The testator may also, in such a disposition, reserve power to himself to burden the estate, and exercise that power afterwards, the writing by which it is exercised being reckoned a part of the same deed; but the heir cannot be burdened by a mere deed of legacies.

While, however, a testamentary bequest of heritage cannot operate directly to affect the heir's right of succession, it may be made under

circumstances, which will indirectly secure fulfilment of the testator's intention; for, if the heir-at-law be benefited by the testament by which heritage is bequeathed, he will not be entitled to refuse effect to the bequest of heritage, while taking advantage of the provision in his favour. This is the doctrine of approbate and reprobate, which is well illustrated by the case of *Cunningham v. Cunningham*, M. 617. 17th January 1758. Here, the heir-at-law, having received benefit as residuary legatee, was held thereby debarred from challenging a legacy of Scotch heritable property; and the rule is also clearly exemplified in the subsequent case of *Dundas v. Dundas*, 14th January 1829, affirmed 22d December 1830.

PART III.
CHAPTER III.
DOCTRINE OF
APPROBATE AND
REPROBATE.

7 S. 241.
4 Wil. & Sh.,
App. 460.

The rule which denies effect to dispositions of heritage executed upon deathbed has been regarded by the highest legal authorities in England as excellent in its principle and effects. It took its rise, no doubt, in the ancient favour with which the heir was regarded, as well as the supposed incapacity of a dying man to judge aright of his settlements, and the propriety of affording him protection against those by whom he may then be surrounded. We have already noticed the circumstances which afford a presumption in law that the deed was made on deathbed. The objection extends also to deeds made by a person under sentence of death.

LAW OF DEATH-
BED.

One of the most important effects produced by the law of deathbed is, that holograph deeds, which do not prove their own dates, but are taken to be of the date least prejudicial to the heir, are necessarily presumed to have been executed upon deathbed; *Maitland v. Maitland*, 16th May 1815. It is, therefore, of vital importance to the effect of *mortis causâ* deeds, that, although written by the testator, the execution of them should be attested by witnesses. The deeds which may be reduced on the head of death-bed embrace all prejudicial to the heir, either by direct conveyance of heritage, or by the gratuitous transference of moveable obligations, whereby the heir may be exposed to claims arising from the insufficiency of the personal estate to liquidate the claims properly affecting it; *Cowie v. Brown, &c.*, 22d July 1707. No deeds, therefore, executed upon deathbed, can withstand the challenge of the heir-at-law, excepting such as the testator was under an obligation to grant. Gratuitous bonds of provision, accordingly, and legacies, are reducible by the heir, in so far as they affect the heritable estate; *Campbell's Younger Children v. Campbell*, 15th November 1757. But family provisions, although granted on deathbed, are not reducible when they are made in implement of a prior legal obligation; *Forbes v. Forbes*, 11th February 1755. The heritable estate was here by marriage contract provided to the heir male of the marriage, with this reservation, that the grantor, *etiam in articulo mortis*, should have power to provide a certain sum for his younger children. This power having been exercised on

HOLOGRAPH
SETTLEMENT
PRESUMED EX-
ECUTED *ex capite*
lecti.

DEEDS REDU-
CIBLE *ex capite*
lecti.

M. 3220.

M. 3232.

M. 3277.

RESERVED FAC-
ULTY TO ALTER
ON DEATHBED.

PART III.

CHAPTER III.

M. 3284.

deathbed, the provision was reduced by the Court of Session. But the House of Lords decided, that the bond having been granted in execution of a faculty reserved in the contract of marriage, the exception of deathbed did not lie either against the principal sum or annualrent thereof.

ONEROUS DEEDS
ON DEATHBED.Ersk. Inst. iii.
8, 97.

M. 428.

Since a father lies under an obligation to maintain his younger children, he may, upon deathbed, provide a sum for their aliment during minority; and he may also settle a jointure upon his widow not exceeding the legal terce. This was found in a case in which the testator was not infest; *Logan v. Campbell*, 18th December 1758—a decision which illustrates also the power to grant aliment to younger children.

EXCLUSION OF
CHALLENGE BY
liege poustie
DEED.

RIGHT OF
CHALLENGE
REVIVES ON RE-
VOCATION OF
liege poustie
DEED.
F. C.; 2 Sh.
App. p. 9;
1 Ross, L. C.
646.

The heir's right of challenge is excluded, if he is deprived of the succession by a deed executed by the ancestor when in *liege poustie*, that is, while in health, and possessing the *legitima potestas* to dispose of his estate at pleasure. The heir's challenge being founded in principle upon the incapability of a party to dispose of his estates upon deathbed, the grounds of that challenge are removed, if there be a deed, not executed upon deathbed, and remaining effectual at the granter's death, by which the heir is excluded. His right, however, revives, if the *liege poustie* deed be revoked even *pro brevissimo intervallo*, and he may sue for reduction of other deeds not made in *liege poustie*, which have not been accepted or homologated by himself, in the same manner as if his right had never been excluded; *Moir v. Mudie*, 2d March 1820; affirmed 1st March 1824. Here, a deed executed on deathbed, revoking all prior settlements, and making a new disposition of the testator's property, was reduced as regarded the disposition, but held effectual to revoke the prior settlement. Thus, from favour to the heir, an effectual revocation may be made on deathbed, even in a deed reducible at his instance as prejudicial; and his right being thus let in, he cannot be excluded by a declaration that the purpose of the revocation is to revive a prior deed, by which he was excluded; *Ker v. Erskine, &c.*, 16th January 1851. A deed is effectually revoked by being cancelled; *Finlay v. Birkmire*, 29th July 1779.

13 D. 492.

M. 3188.

MUST DEED OF
REVOCATION BE
PROBATIVE?

The question has excited great diversity of views, whether a settlement of Scotch heritage can be effectually revoked by a foreign deed, not probative according to the law of Scotland. By some eminent Lawyers it is held that the revocation of a settlement of heritage being a deed of importance, and a writ importing heritable title in terms of the Act 1579, cap. 80, must be executed according to the solemnities imposed by that statute, and by the statute 1681, cap. 5. By others it is held, that revocation is not a writ importing heritable title, but only an act by a party exercising power over his own undelivered deeds. Again, the result is thought to depend not upon an

absolute incompetency in the foreign deed to affect a recall, but upon whether it sufficiently expresses the intention to do so. The case of *Dundas v. Dundas*, 25th February 1783, is cited as decided by Lord THURLOW upon defect of evidence of intention ; and there is a series of decisions in which revocation in an English will of all wills previously made, and also of all testamentary dispositions previously made, has been found ineffectual to recall a settlement of heritable property in Scotland ; *Fordyce v. Cockburn*, 5th July 1827 ; *Cameron v. Dick's Trustees*, 29th August 1833. The whole authorities are reviewed, and the different doctrines investigated, in *Leith's Trustees v. Leith*, 6th June 1848, where the opinion of the majority of Court was, that a disposition of Scotch heritage may be revoked by an English will. But it was decided, that an English will, revoking "all former wills, codicils, "and testamentary dispositions," was not intended to revoke, and did not revoke, an antecedent Scottish trust disposition of heritage.

When there is an express revocation, the testator cannot prevent the revival of the heir's right by merely declaring the subsistence of the prior deed, so as to exclude the heir, if, in truth, the conveyance in prejudice of the heir is altered, in such a manner, that no right remains in the grantees of the *liege poustie* deed. See Lord Chancellor ELDON's judgment in *Crauford v. Coutts*, 14th March 1806. In order, therefore, to debar the heir's right to challenge deeds made upon deathbed, there must be a deed made in *liege poustie*, whereby he is excluded, and power reserved to the maker to alter ; and then alterations may be made even upon deathbed, by either of the following methods, viz.,—(1.) A revocation may be inserted in the subsequent deed, but subject to this declaration, that the prior deed shall subsist in case the later one shall be ineffectual. The last disponent is thus enabled to say to the heir—You have no interest to reduce this deed, because, although I were excluded, the *liege poustie* deed will take effect. In this way the ultimate disponent is secure, because it is the heir alone who has the right to challenge. (2.) The heir's right continues debarred, if no revocation be inserted in the later deed, for then it is held to be executed under the reserved powers of the first ; and, although the disposition of the property be altered, that forms no implied revocation of the prior deed, because the new deed is founded upon its reserved power to alter, and the very execution of the new deed, therefore, is a declaration of the continued subsistence of the first ; *Rowan v. Alexander*, 22d November 1775 ; *Roxburgh v. Wauchope*, 29th May 1820. The power to burden and alter may be exercised upon deathbed, although the words *etiam in articulo mortis* be not inserted in the reservation, because by the disposition the heir's right is excluded, and the disponent is subject to the reserved power ; *Douglas v. Douglas*, 22d June 1670 ; *Buchanan v. Buchanan*, August 1758.

PART III.
CHAPTER III.
M. 15,585 ;
1 Ross, L. C.
667.
5 S. 897 ;
1 Ross, L. C.
412.
7 Wil. & Sh.
App. 106 ;
1 Ross, L. C.
406.
10 D. 1137 ;
1 Ross, L. C.
615, 691.

CONDITIONAL
REVOCATION.

REVOCATION
NOT IMPLIED
BY ALTERED
DISPOSITION.

5 Br. Supp.,
323 ; 2 Hailes,
659 ; 1 Ross,
L. C. 653.
2 Bligh's App.
619 ; 1 Ross,
L. C. 659.

2 Br. Supp.,
147.
M. 3285.

'ART III.

AFTER III.

Destinations in conveyance of Heritable Subjects.—In order to qualify him to prepare, or to judge of the effect of, a settlement, it is very necessary that the Conveyancer be acquainted with the terms ordinarily used in the destinations of heritable property, and the precise results which follow from the use of those terms. We shall, therefore, shortly examine the meaning of the different terms by which heirs are designated, and the effects which flow from different modes of expression used in their appointment.

HEIRS."

HEIRS IN GENERAL."

The general terms, "heirs," and "heirs in general," include all who are heirs by law, as heirs of line upon whom the law bestows the *feuda antiqua*, i. e., heritable property acquired by inheritance—heirs of conquest, who, in the ascending line among brothers, succeed to the *feudum novum*, or property acquired by singular title—and heirs named by a previous destination, who are called heirs of investiture.

HEIRS WHATSOEVER."

The phrase "heirs whatsoever" was originally introduced when there was a strict interpretation in favour of the superior, in order to exclude his claim to the estate upon failure of heirs of the investiture. "Heirs whatsoever" is equally comprehensive with the single word "heirs," and is applicable to the same classes of heirs, meaning in every case those whom the law points out. When lands are disposed, therefore, to a person named, and, failing him, to the disposer's heirs whatsoever, the property, upon failure of the donee, will go to the grantor's heir of line, if he obtained it by inheritance. If it was acquired by purchase or other singular title, it will go to his heir of conquest. If, again, it was held under a previous investiture, it will go to the heirs named in the investiture, if such appears to have been the testator's intention. Of this we have an example in *Mac- lauchlan v. Campbell*, 12th January 1757. Here, under "heirs whatsoever," there was held to be called, not the heir of line, who was the son of a daughter, but the heir-male, as being the heir of investiture pointed out by a prior wadset, of which the deed in question was partly a renewal. In *Douglas v. Douglas*, 4th March 1777, the claim of a party as heir of investiture to subjects destined to "heirs whatsoever" was rejected, the Court being of opinion that the heir of line was intended by the testator; and, in *Stewart or Richardson v. Stewarts*, 8th April 1824, the Court gave effect to their view of a testator's intention, by finding heirs-portioners entitled to succeed under a destination to heirs whatsoever, although by a subsequent branch of the same destination, heirs-portioners were excluded, but without express reference to the previous part.

HEIR OF

"

iii. 5, 10.

HEIR-MALE
LINE."

"Heir of line" is equivalent to heir-at-law, and is, therefore, applicable to the heir of conquest, but "heir of line" commonly designates the heir in heritage.

The term "heir-male of line" was sustained as a proper expression

to mean the heir-male not of conquest, in *Sinclair v. Earl of Fife*, 24th June 1766, affirmed on appeal, M. 14,944. PART III.

The "heir-female" is not necessarily a female, but is the next heir-at-law, male or female, after lineal heirs-male are exhausted. This was settled by the Bargany Case; *Dalrymple*, 11th July 1738, reversed 27th March 1739. Here the destination was to the oldest son, and his heirs-male, whom failing, to the second son and his heirs-male, whom failing, to the heirs-male of the father, whom failing, to the eldest heir-female of the body of the father. The two sons successively possessed the estate, and died without male issue, so that the three first branches of the destination, calling the heirs-male of the two sons and father, were exhausted. The question then arose, who was the eldest heir-female of the father's body in terms of the destination; and there appeared three claimants, founding upon their propinquity as sons and daughter of these three parties, viz.,—1st, a daughter of the father; 2d, a daughter of the eldest son, and 3d, a daughter of the youngest son. The Court of Session preferred the son of the father's daughter, but the House of Lords reversed the decision, and found, that Sir Hew Dalrymple, the son of the oldest son's daughter, was entitled to the estate, he being according to the ordinary rules of succession the next heir-at-law upon failure of all the heirs-male. When a party, therefore, intends to call his own daughter in preference to the daughter of his son, he should dispoise to her *nominatim*, or to his own daughter, and not leave her succession dependent upon a destination to heirs-female. CHAPTER III.
"HEIR-FE-
MALE."

Elchies, voce
"Provision to
"Heirs," No.
2; Cr. & St.
App. 237.

When words of destination are used, of which the meaning is fixed, the rule is to give effect to that meaning, irrespectively of any presumptions that the granter's intention was different; *Hay v. Hay*, 24th July 1788. Here, the first branch of the destination gave the estate successively to certain persons, and to the heirs-male of their bodies, (the heirs-male of the body meaning a son, or a male descendant of a son, connected entirely by males,) after which the succession was given to A., and "his lawful heirs-male." There was strong reason to presume that the change had crept in *per incuriam*, and that the testator's intention truly was to substitute the heirs-male of the body of A., as well as of the prior members of the destination. A. having died without issue, his brother was preferred to succeed to him before a posterior substitute, notwithstanding the presumption afforded by the previous parts of the destination, that the intention was to call only heirs-male of the body of A. THE FIXED
MEANING RULES.

M. 2315.

While the meaning of *heirs-male*, however, is fixed and inflexible to this extent, that under it none but males deriving their connexion through males can succeed, and, therefore, females, and the descendants of females, are absolutely excluded, yet the phrase is capable of limitation, and it will receive a more or less extensive construction "HEIRS-MALE"
SOMETIMES CON-
STRUED SO AS TO
GIVE EFFECT TO
INTENTION.

PART III.
CHAPTER III.
EXTENSIVE
CASES.

according to the testator's intention. This was clearly stated by Lord ELDON in the *Barboursie* case. The destination was "to the eldest daughter of Mary Lord Kerr, without division, and their heirs-male." The first question which arose here was, whether the "eldest daughter" was designative of one particular daughter, or whether it had a successive application to all the daughters of Lord Mary Kerr. It was decided, that the estate was given to the daughters "successive et servitum." In a subsequent stage of the litigation an attempt was made yet further to extend the terms, "the eldest daughter," so as to mean the eldest heir-female, and to prefer a descendant of the eldest daughter, although not the heir-male of her body; but the Court rejected that interpretation, and gave the succession to the heir-male of the body of the third daughter; *Lady Essex Kerr v. Sir James James Kerr, &c.*, 13th November 1810.

With respect again to the words, "their heirs-male," Lord ELDON admitted, that these terms do usually mean "heirs-male general," and that this, being the *primâ facie* obvious meaning, is to be adopted, unless, by necessary implication or plain declaration, you are driven out of the obvious meaning. In this case, however, it was impossible to give the words their *primâ facie* sense, because the context shewed that such was not the meaning of the testator, for his own heirs-male whatsoever were subsequently called, a substitution comprehensive of the heirs-male whatsoever of his daughters, and which, therefore, would have taken away all separate force and meaning from the appointment of their heirs-male. Upon the general principle, therefore, of construction with reference to all parts of the deed, so as to give to every portion of it a sense, his Lordship, affirming the judgment of the Court of Session, held, that the heirs-male of the daughters meant "heirs-male of their bodies." The case is in the Dictionary, and full extracts from Lord ELDON's speech are given in the first appendix to Mr. Sandford's work on heritable succession.

M. voce, "Tail-
"ing," App.
No. 7.

"AND" EQUI-
VALENT TO
"WHOM FAIL-
"ING."

10 D. 695.

1 Bell's App.
302.

The word "and" occurring between the institute and his heirs or his children is equivalent to "*whom failing*." Thus, where the destination is to "A. B, my oldest son, and his lawful children in equal proportions," A. B. is sole fiar, and not a joint disponent merely; *Edward, &c. v. Shiell, &c.* 12th February 1848, where it was observed on the Bench, that, according to all known principles of law, this destination is to the father alone, the word "and" being equivalent to "whom failing." The connecting "and" does not necessarily, however, mean "whom failing." In *Lockhart v. Macdonald*, 15th March 1842, in a destination to "the heirs-male of the body, and the heirs whatsoever of the body of the said heirs-male," the terms, "heirs-male," in the first branch, and "heirs" in the second, were both construed distributively, so that, as the eldest son succeeded alone by

virtue of the destination to heirs-male of the body, his daughter was held entitled to come after him as his heir whatsoever in preference to his brother, who would have been next heir-male of the body. If "and" in this case had meant "whom failing," the brother must have succeeded, so that sons might be exhausted before the succession was given to a daughter.

PART III.
CHAPTER III.

With regard to *mortis causâ* dispositions of heritage, it may be observed generally, that the granter may dispoⁿe to himself in the first instance, and after himself to the person upon whom he wishes to bestow the estate. He thus constitutes himself the institute, and upon his death the dispoⁿee will make up his title as heir of provision, or he may dispoⁿe directly to the person who is to succeed him, and so make him the institute, and entitle him upon the succession opening to enter not as heir, but as dispoⁿee, so that he can at once complete his title by means of the disposition, if it contain procuratory and precept, or, if it do not, by suing the heir for adjudication in implement.

USUAL DESTINATION IN DISPOSITION *mortis causâ*.

A disposition to A., whom failing, to B., gives the estate to B. preferably to the heirs of A.; but a destination to A. and his heirs, whom failing, to B., excludes B., until all the heirs descended of A. are exhausted. The dispositive words are applied provisionally to the substitutes, as well as to the institute, and, upon failure of the institute, or a previous substitute, the conveyance carries the estate to the substitute next called, in rigid compliance with the terms of the destination in the dispositive clause. So, in *Grahame v. Grahame*, 20th F. C. June 1816, the heirs-male of the father being called by the dispositive clause in preference to his son's heir-female, a younger son of the father was preferred to the daughter of the oldest son, although, by the procuratory of resignation, descendants of the body of the oldest son without limitation of sex were called preferably to younger sons. When the terms of the destination in the dispositive clause are ambiguous, other clauses may be referred to for explanation, but not when it is clear; *Forrester v. Hutchison, &c.* 11th July 1826.

DISPOSITIVE CLAUSE CONTROLS DESTINATION.

4 S. 824.

With regard to the effect of the disposition *mortis causâ*, when it is in favour of the heir, he cannot be effectually burdened by a subsequent testament, which is the last will, and he is not affected by death-bed deeds. But, when the conveyance is to a stranger, he may be burdened with debts in a testament, "because a testament is full evidence of the dispoⁿer's will, which is sufficient to burden the dispoⁿee ultimately with the debts;" *Davidson v. Nairns*, 19th February 1755.

5 Br. Supp. 289.

Disposition to the Heir.—Conveyances may be made in the contemplation of death in favour of those who would succeed at any rate

PART III. as heirs-at-law ; and this is a course which may be taken with different objects :—

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OBJECT OF
DISPOSITION TO
HEIR-AT-LAW.

In the first place, it facilitates the completion of the heir's title, by furnishing him with warrants upon which he can have recourse immediately to the superior, without the delay and expense of service. 2dly, It is a simple and direct mode of making provision for younger children out of the heritable estate. Such provisions are either made a burden upon the disponent, which will constitute them personal claims against him as conditions of the disposition, or they may be created real burdens, according to the rules which will afterwards be examined,—and this is the preferable course, inasmuch as the children will thus have heritable security, and rank as preferable creditors upon the heir's right by virtue of his infestment. Here, it must be kept in view, that provisions so constituted are conquest in the persons of those who receive them, and will, therefore, pass to their heirs, not of line, but of conquest. 3dly, Another object secured by the disposition in favour of the heir is to exempt him from a universal representation, the liability of the acceptor of a disposition *mortis causâ* being restricted to the value of the estate conveyed ; *Smith v. Marshall*, 21st July 1780 ; and the same was held in regard to a disponent who was also heir-at-law ; *Bruce v. Bruce*, 13th December 1826. When this form of settlement is adopted, it will consist of a *de præsentî* conveyance proceeding upon a consideration of love and affection. The disponent will be obliged by acceptance to pay the grantor's debts, and the provisions and legacies. There will be a reservation of the grantor's liferent, a power of revocation, and a dispensation with delivery.

M. 2322.

5 S. 119.

The most usual form of settlement *mortis causâ* is

The Trust-disposition and Settlement, by which the universal estate, heritable and moveable, belonging to the testator, is conveyed to certain persons in trust, with instructions how to dispose of it. This deed we shall now examine upon such points, as have not already been reviewed, viz. 1. The nomination of trustees. 2. The declaration of trust and of purposes. 3. The powers of the trustees. 4. The liabilities of the trustees. Some observations shall be added upon the constitution and operation of the trust after the testator's death.

GRANTOR MUST
HAVE RADICAL
RIGHT.

It may be remarked at the outset, that a trust-conveyance can only be granted effectually by a party possessing the radical right of property. Therefore, where a new trust was executed by two trustees, it was held an incompetent proceeding, the original trust containing no power of devolution ; *Freen v. Beveridge*, 28th June 1832.

10 S. 727.

Nomination of trustees.—It is prudent to have reasonable grounds

to expect, that the person named will accept. In *Dallas v. Leishman*, 21st November 1710, a trustee, who had been appointed without his knowledge, refused to subscribe any deed. The Court, however, obliged him to denude, but in such terms as to import no liability. The trustees are named and designed as the disponees of the estate in the dispositive clause. When there are more than one, the expression ought to be such as will make it appear, that the confidence of the truster was extended to them separately, and that it was no condition of the conveyance, that they should all accept. This is the prudent rule, and observations on the subject will be found in *Lord Drumore, &c. v. Somervil*, 16th June 1742. A nomination of tutors and curators, however, or of trustees, does not fall by the death or failure of one or more of the number, unless the appointment expressly bears to be joint. In *Campbell v. Lord Monzie, &c.*, 26th June 1752, five trustees being appointed with power to the majority, three of the number having repudiated the trust, the acceptance of the remaining two was found to preserve it. Where the expression is such, that the trust cannot be executed by fewer than a specified number, it is preserved by the acceptance of a quorum—that is, of a limited number fixed by the testator, whose acts shall be as conclusive and effectual, as if done by the whole trustees named; *Halley v. Gowans*, 20th February 1840. And, in *Shanks v. Aitken*, 4th March 1830, where the quorum was a majority of the acceptors, and two of the trustees had an adverse interest, a majority of the remaining number, though less than a majority of the whole, was held entitled to act. The majority in number of the acceptors is generally named a quorum, and it ought not to be less than the majority, as there might otherwise be two bodies competent to transact in relation to the same property. The nomination of a quorum is highly expedient in obviating inconvenience in obtaining the consent and concurrence of absent trustees, and in preventing the trust from becoming inoperative in the event of a difference in opinion arising among the trustees.

Sometimes one of the trustees is a *persona prædilecta*, and, as he pre-eminently enjoys the testator's confidence, he may on that account be named a trustee *sine quo non*, whose consent, therefore, will be indispensable to every act. The non-acceptance, however, of a trustee *sine quo non* will not annul the trust, if that be not the express intention of the testator; *Forbes v. Earl of Galloway's Trustees*, 2d February 1803. But the concurrence of a trustee *sine quo non* after his acceptance is indispensable to every act; *Vere v. Earl of Hyndford*, 1st June 1791. We have already found in the case of *Stoddart v. Rutherford*, 30th June 1812, that a married woman may competently be named, and act, as a trustee and *sine quâ non*; and, when both she and her husband are appointed, she is entitled to act and vote as a separate trustee; *Watson v. Stormonth or Darling*, 11th May 1825.

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M. 16,191.
NOMINATION OF TRUSTEES.

M. 14,703.
Ersk. Inst. i. 7,
30, and iii. 3,
84.
M. 14,703.

QUORUM.

2 D. 623.
8 S. 640.

TRUSTEE *sine quo non*.

M. voce, "Sol-
dum et pro
"ratâ," App.
No. 3.

Bell's 8vo.
Cases, 554.
F. C.

1 Wil. & Sh.
App. 188.

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DESTINATION
TO ACCEPTORS
AND SURVIVORS.

13 D. 1381.

All difficulties with regard to the non-acceptance of any of the trustees named, and the power of a majority to act, are obviated by the usual terms of the conveyance, which is made to the persons named, and to the survivors or survivor of such of them as shall accept, the majority, while more than two survive, being a quorum. There will be found much useful information in the report of *Gordon's Trustees v. Eglinton*, 17th July 1851. There was here a general trust disposition to A. B. and C., and the survivors and survivor. By a codicil other trustees were appointed, but the words "survivors" and "and survivor" were not repeated. A title was made up by the heir, and a conveyance executed by him in favour of the three acting trustees, and their heirs and assignees; and, one of the three having died, a question arose, whether the survivors had power. It was held as a general doctrine, that the title does not control the trust, but the trust the title, and that the powers and conditions of the trust are to be taken from the trust-deed, and that the survivors, therefore, had power to convey. The terms of the deed here excluded doubt, when it was to rule. But, where the trust is not given expressly to survivors, does the entire trust accresce to them, or does a right pass to the heirs of a deceasing trustee? In practice hitherto, an express extension of the trust to survivors has been held requisite to enable them to act, and in prudence the deed should be so prepared as to prevent all question. A confident opinion, however, will be found expressed by Lord Justice-Clerk HOPK in this case, that no right passes to the heir of a deceased trustee, there being no *pro indiviso* right to a share conveyed by the trust-deed—that each of three trustees has the full title along with the other two, and, if they die, his title carries the whole right to the exclusion of all others, a deceased trustee's title being absorbed by the title subsisting in the survivors. The doctrine delivered by Stair appears to support this view. He distinguishes between joint mandates *inter vivos*,—where the authority, being given to all, returns to the living mandant upon the death of any one,—and power given to executors without mention of a *quorum*, where the deed is extended in order that the act may stand, because power given by a defunct in contemplation of death cannot return, and he is presumed to prefer all the persons nominated to any others. When the trust is not granted to the heirs of the trustees named, it is stated by the Lord Justice-Clerk, that upon the death of the trustees the title to the trust property would be carried on into the persons of their heirs, so as to prevent the right reverting to the truster's heir. But the trustees' heirs would only hold subject to the purposes of trust, and under obligation to denude when duly called upon. The powers of the trusters would not pass to them by the law of Scotland.*

i. 12, 13.

13 D. 1385.

* Where a testamentary deed appoints trustees, the condition of survivorship is implied

The conveyance in the dispositive clause either comprehends all the granter's lands by specific description, or it refers to separate conveyances of particular estates in favour of the same trustees, or it is a general conveyance of the whole heritable, as well as of the whole moveable, property belonging to the granter. Even when there is a special conveyance or separate dispositions, there should be added a conveyance generally of all other lands belonging to the granter, which will transmit any heritable property that may have been omitted, or which may be subsequently acquired. In supplement of the general conveyance of moveable property, the trustees are appointed executors, which will enable them to obtain confirmation *de plano*. They are also appointed tutors and curators to such of the granter's children as may be under age at his death, a nomination attended with great convenience, since it provides means to recover and manage any property which may accrue to the children during their minority.*

Declaration of trust, and purposes.—The conveyance is declared to be in trust for the purposes set forth in the deed, of which the first is usually the payment of the debts of the granter.

The trustees are entitled, like the heir, to pay *primo venienti*, if they have not been interpellated by diligence; *Rankine v. Gairdner*, 24th November 1731; and it is not incumbent upon them to institute an action of multiplepoinding, while there is no judicial striving for a preference; *Alison v. Earl of Dundonald's Trustees*, 26th January 1793. When the heritable property is destined to one party, and the moveable property to another, and both of these are burdened in general terms with payment of the testator's debts, the rule of law remains undisturbed, and each is liable for the debts legally affecting the estate which he has received; *Campbell v. Campbell*, 1st June 1749. A *mortis causâ* trust settlement, with directions to the trustees to pay the granter's debts, is not a trust for behoof of creditors, and a creditor may obtain the same preference by diligence against the trustees as executors, which he could have done by diligence against the debtor himself; *Globe Insurance Company v. Mackenzie*, 5th August 1850.

The second purpose is generally payment of the expenses of the trust; and we have—

Thirdly, the objects to be benefited. The appropriation to be made by the trustees may either be inserted in the trust-deed itself,

on the principle that a truster prefers that any one of the trustees nominated should manage the estate, rather than a judicial factor. So, where the two trustees who had been nominated by the testator accepted and acted, and one thereafter died, a petition for a judicial factor was refused as unnecessary; *Findlay*, 30th June 1855. See also *Seton v. Seton*, 28th November 1855.

* The case of *Mackilligin v. Mackilligin*, as to the revocation of an appointment of trustees, and a nomination of new trustees without dispositive words, will be found noted in the

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CONVEYANCE
TO THE TRUSTEES.

TRUST PURPOSES.

1. PAYMENT OF TRUSTER'S DEBTS.

M. 16,201.

M. 16,211.

Cr. & St. App. 436.

7 Bell's App. 296; *supra*, p. 306.

2. PAYMENT OF EXPENSES OF TRUST.

3. OBJECTS TO BE BENEFITED.

17 D. 1014.

18 D. 117.

18 D.

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CHAPTER III.
SEPARATE DEED
OF INSTRUCTIONS.

or in a separate deed of appointment or instructions. The latter plan is attended with convenience, inasmuch as circumstances may arise, rendering it necessary to vary the purposes of the trust, and, when the instructions are separate, these can be altered without disturbing the trust-disposition. When this plan is adopted, the trust-disposition will refer to such purposes as are contained in separate instructions or directions already executed, or which shall be contained in any writing to be afterwards executed by the granter. The separate instructions may be in the form of a testament, which, by virtue of the reference connecting the deeds, will be held as part of the trust-disposition; *Willoch v. Auchterlony*, 14th December 1769. The testament also may be executed in England, and in the English form; and, although not probative by the law of Scotland, such a testament, along with a trust-disposition, is an effectual settlement of Scotch heritage; *Ker v. Ker's Trustees*, 24th February 1829; *Cameron v. Dick's Trustees*, 19th May 1831. And, where an English will contained a revocation of previous wills, a previous disposition of Scotch heritable property was held not to be thereby revoked, that deed being necessary to make the will effectual; *Fordyce v. Cockburn*, 5th July 1827. In the event that no instructions are left, or that such as are left shall be void from informality or any other cause, that will necessarily render the trust-disposition abortive, and let in the claim of the heir. Such a result it may be the anxious wish of the testator to prevent, and this he may do by inserting in the trust-disposition a provisional statement of the purposes, to which he desires his property to be applied, and declaring that these purposes shall take effect, in the event of his leaving no other or further directions, or in the event of such directions proving ineffectual. In this way, although the purposes inserted in the trust-disposition may not be such as the testator ultimately desires, still they will secure the fulfilment of his intention to exclude the heir.

FIXING DATE OF
VESTING OF PRO-
VISIONS.

When money provisions are directed to be paid, the time of vesting ought to be specified. In the Juridical Styles this is properly done by declaring, that the provisions shall not vest until the term of payment, a result which in this case would not happen without the special provision to that effect, inasmuch as by a previous clause the provisions are to bear interest before the term of payment, an arrangement which is generally taken as indicating an intention that they should vest before the time of payment. Rights should also be given to the issue of any child who may predecease the term of payment.

INSTRUCTIONS,
WHERE UNCER-
TAIN OR ILLE-
GAL.
Elchies, voss
"Tailzie," No.
48.

The instructions must be clear and explicit, as well as certain. We have already had occasion to refer to the failure of a mortification for the erection of an hospital in consequence of an imperfect specification of regulations by the testator; and *Macculloch v. Macculloch*, 28th November 1752, is an example of reduction of settlements on the ground

of irrationality. The purposes also must be legal. In *Strathmore v. Strathmore's Trustees*, 23d March 1831, the accumulation of rents of heritable property for thirty years was allowed, Scotch heritable property having been expressly exempted from the provisions of the Act 39 & 40 Geo. III. cap. 98, which are now, however, extended to such property by the Entail Amendment Act; so that accumulation is now incompetent for a longer period than twenty-one years from the grantor's death. Of the application of the statute in preventing the accumulation of moveable property in Scotland, we have an example in *Lawson, &c. (Ogilvie's Trustees) v. Kirk-Session of Dundee*, 18th July 1846, where the direction was to accumulate for one hundred years, in order then to erect an hospital. If from informality, uncertainty, or illegality, the purposes shall fail, then the trust is void, and the estate will go to the heir-at-law.

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5 WIL. & SH.
APP. 170.

8 D. 1229.

The instructions must be carefully framed, with a view to the nature of the interest which the parties are to have, upon whom the trust property is beneficially bestowed; because the phraseology used in the instructions will determine the extent of the right obtained by the beneficiaries, and whether it is an heritable or moveable estate in their persons. The claim of the beneficiaries is against the trustees, to make good to them the trust estate for their several interests. These interests depend upon the terms used, whether giving a life-rent, or a fee vesting immediately, but with a postponed term of payment, or a conditional fee contingent on certain events, or a fee to become vested and payable when funds are realized.

The nature of the right in the beneficiary, again, whether heritable or moveable, depends upon the character of the interest bestowed on him. If the trust fund is moveable, then the legatee's share is necessarily moveable; but, if the trust estate is heritable, the beneficial interest will be heritable or moveable according to the testator's purpose and instructions, and the nature of the demand, which, in terms of the settlement, the beneficiary is entitled to make upon the trustees. If they are directed to convey lands to him, then the right is heritable; *Durie v. Coutts*, 30th November 1791. Here, a bond heritably secured was conveyed for the use and behoof of two parties, without any direction to realize and divide the amount; and their rights were thereby decided to be heritable. In *Burrell v. Burrell*, 11th December 1825, there was an alternative direction to pay the proceeds, or to denude of the heritage unconverted. The heritage being unconverted at the beneficiary's death, his interest was held to be heritable. But, if the trustee holds under an obligation to account for the proceeds, or to pay certain sums of money, although these are to come out of heritable estate, the claim of the beneficiary is moveable; *Angus v. Angus*, 6th December 1825. Here, the direction to the trustees was to convert the property into money, and to divide and pay over the residue in certain shares to the truster's children. The

BENEFICIARY'S
RIGHT, HERITA-
BLE OR MOVE-
ABLE.

M. 4624;
1 Ross, L. C.
524.

4 S. 314;
1 Ross, L. C.
535.

4 S. 279;
1 Ross, L. C.
529.

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BENEFICIARY'S
RIGHT, HERI-
TABLE OR
MOVEABLE.

8 S. 803.

13 D. 81.

12 D. 372.

15 D. 159.

BENEFICIARY'S
RIGHT ASSIGN-
ABLE.

1 S. 185.

2 S. 682.

BENEFICIARY'S
RIGHT ARREST-
ABLE.

M. 759;
Hailes, 855.

share of a child was held to be moveable; and the true principle was here stated by Lord GLENLEE, viz. that, where a beneficial interest in the subject is constituted in the party, as when it is disposed to trustees to hold for A. in liferent and B. in fee, the right of the fiar is heritable; but that, when the beneficiary's interest is a claim for a share of the residue, it is moveable, and descends to executors. In consistency with this principle, when there was a power to sell for payment of legacies, but no direction to sell, and the residue was declared to belong to A., to whom the trustees were directed to dis-
pone and pay, the residue, being heritage, was held to be heritable in the succession of A.; *Cathcart v. Cathcart*, 26th May 1830. To same effect is the case of *Speirs v. Speirs*, 21st November 1850, and the beneficiary's interest, therefore, was held not liable to a claim of *legitim* by his next of kin. When the share of a beneficiary has been ascertained, and is invested by the trustees with his knowledge and sanction upon heritable security, it is heritable as regards his suc-
cession; *Williamson v. Paul*, 15th December 1849. But, as long as the trust continues, it is fixed by our practice, that the rights of parties are not altered by investment of the trust funds. Where a husband was bound to pay £30,000 to trustees to provide a jointure to his wife and provisions to his children, instead of paying he transferred to the trustees an heritable bond, and the fund was re-invested by the trustees in heritable security. Both purposes being accomplished, and a surplus remaining for the husband's representatives, it was held to be moveable, the husband's position being that of claimant on the fund, which by the original constitution of the trust was moveable, and not altered by the investment; *Meiklam's Trustees v. Mrs. Meiklam's Trustees*, 2d December 1852.

The interest of the beneficiary, although the property remains vested in the trustees, may be transferred by him, either by a *mortis causâ* deed, as in *Gordon's Trustees v. Harper*, 4th December 1821, or by assignation. The right being a *jus crediti* merely is personal, and does not, therefore, require a feudal conveyance; *Macdonald and Selkraig v. Russell*, 6th February 1824. Here, we find the distinction pointed out between the reversionary right of the granter of a trust *inter vivos*, and that of a beneficiary who had no previous title. In the former case, which is usually that of a trust for the payment of debts, the trustee's right is only a burden upon the radical title, so that the title of the truster remains, and his reversionary interest could only be transferred by a proper feudal conveyance. But a beneficiary with no previous title has only a *jus crediti*, or right to call on the trustees to account or denude.

The proper diligence to attach the right of a legatee in the hands of trustees, even when the trust property is heritable, is not inhibition, but arrestment; *Grierson v. Ramsay*, 25th February 1780. If a creditor of the legatee, however, should raise adjudication in order

to secure his debt upon the subject, the litigiosity created by the suit affects the nature of the diligence suited to affect the property, and the proper diligence then would be the inhibition on the dependence; *Wilson v. Smart*, 31st May 1809.

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F. C.

We have already had occasion in treating of the marriage contract to point out the care with which directions to execute an entail must be expressed. When the direction is generally to convey to the favoured party in the form of strict entail, containing such conditions as the trustees shall consider necessary, that is a good authority to the trustees to insert all the requisite fetters; *Stirling v. Stirling's Trustees*, 30th November 1838. In obeying the direction to make an entail, we must have regard to the testator's intention. Where he directed, that it should contain all the conditions and fetters of a specified entail, adding, "so as to form a valid and effectual entail according to the law of Scotland," and after his death the specified entail was found to be defective, the beneficiary claimed to have the lands conveyed to him in fee-simple, that being the effect of the entail prescribed as a model. But the Court held the trustees bound to make a valid and effectual entail; *Graham v. Lord Lynedoch's Trustees*, 15th March 1852, affirmed 14th June 1855. If prohibitions are specified in the trust-deed, and no discretionary power given to the trustees, the Court will not allow any limitations to be inserted excepting those which are so expressed; *Cuming's Trustees v. Cuming*, 10th July 1852; and, in *Campbell's Trustees v. Campbell*, 12th May 1838, the testator having prescribed the substitution of heirs to be inserted in the entail, without directing heirs whatsoever to be called after the last substitute named, the Court would not allow these general words to be added. When money is directed to be invested in the purchase of land to be entailed, the beneficiary is entitled to the interest of the fund while remaining uninvested after the period at which the direction might reasonably have been fulfilled; *Earl of Stair v. Earl of Stair's Trustees*, 29th March 1825. Money cannot be entailed, and a direction to invest the price of lands, and to pay the interest to the heirs in their order, was found to give the price absolutely to the first disponent, without any benefit or right of credit to the ulterior destinees; *Duthie v. Duthie*, 25th February 1841. The same principle is now applied to trusts of land, which, by § 47 of the Entail Amendment Act, cannot be held for the benefit of disponents in succession, the first disponent being entitled to have his right judicially declared to be that of fee-simple proprietor.

INSTRUCTIONS
TO ENTAIL.

1 D. 130.

15 D. 558.

2 Macq. App.
295.

10 S. 804.

16 S. 1004.

1 Wil. & Sh.
App. 72.

ENTAIL OF
MONEY VOID.

3 D. 616.

When money is directed to be invested, the question arises—What are the beneficiary's rights if an investment is not immediately found? And it is now settled by a series of decisions, that he is entitled to the annual proceeds of the fund, as he would have been entitled to the rents from the testator's death, had an investment then been found. In *Earl of Stair v. Earl of Stair's Trustees*, 19th June 1827,

INTEREST OF
TRUST-FUNDS.

2 Wil. & Sh.
App. 614.

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1 Macq. App.
243.

16 D. 1.

15 D. 27.

EFFECT OF
TRUST ON QUES-
TIONS OF VEST-
ING.

15 D. 609.

interest was allowed, commencing from twelve months after the testator's death, that period being allowed to collect the estate and to pay debts and liabilities. But, in *Macpherson v. Macpherson*, 11th June 1852, it was decided, upon an examination by Lord ST. LEONARDS of the English authorities, and of the decision in the case of *Stair*, that it is inconsistent with the effect due to the testator's intention to defer the allowance of interest for any period, and, therefore, it was given from the testator's death. In *Mitchell, &c. (Dickson's Trustees) v. Scott*, 2d November 1853, there was a direction that the interest after a liferenter's death should accumulate for the purchase of land, the purchase being made as soon as the trustees should find it in their power. The Court, holding that the main intention of the testator to benefit the heir must be looked to, limited the accumulation to one year, and gave the interest to the heir from the expiration of a year after the death of the liferentrix. Upon the same principle of regard to the beneficiary's interest, he must have the immediate benefit of investments so far as made; and, where the trust had been executed excepting in regard to a small balance for which no suitable investment had been found, the trustees were not allowed to postpone the execution of an entail, but ordained immediately to convey, reserving the rights of all parties with respect to the balance; *Campbell v. Campbell's Trustees*, 19th November 1852.

Where different interests in liferent and fee are given in trust-deeds, it is important to keep in view the effect of the trust in connexion with questions of vesting. The rules in such cases were pointed out by the Lord Justice-General M'NEILL in *Halbert v. Dickson*, 26th March 1853. Here, the testator had directed his trustees to pay the interest of a share of residue to his niece during her lifetime, and at her death the capital sum to her children. The question arose, whether there was here a vested right to a child who predeceased the liferentrix. It was decided, that the fee had vested, the liferentrix and her children being the sole parties intended to be benefited. Circumstances to be looked to in such questions are—(1.) Whether distinct estates of liferent and fee are given; or, what the Lord Justice-General in *Halbert's* case held tantamount to that, viz., whether distinct interests are created in the interest and capital.—(2.) The existence of a trust, which may suspend the vesting, but cannot exclude it, and does not prevent it.—(3.) Whether any ulterior interest is given beyond that of those first called to the fee, so that the trust may be regarded as having been created for the protection of such ulterior interest. When there is no ulterior interest, then, if the fiar or fiars appointed fail, the result is intestacy; and that result affords the strongest presumption that vesting was intended.—(4.) Whether an individual is the beneficiary, or a class of persons, the latter being less indicative than the other that the testator intended the bequest should vest. The authorities mainly looked to in

the case of *Halbert* were the leading case of *Wallace v. Wallace*, 28th January 1807; also the cases of *Forbes v. Luckie*, 26th January 1838, and *Maxwell v. Wylie*, 25th May 1837.

It is common to exempt provisions granted to daughters from the *jus mariti* of their present or future husbands. Sometimes, also, the right of children is restricted to the liferent of the sum provided to them, as a means of preserving the provision to their issue. In such cases, it may be expedient to empower the trustees to employ a portion of the amount, if the legatees should desire it, in the purchase of an annuity, where there may be cause to apprehend, that by being limited to the interest the legatee's income will be unduly limited. When, notwithstanding the restriction to a liferent, the legatee is allowed to bequeath *mortis causa*, it is not necessary in his will to make special reference to the faculty to bequeath. Such special reference is required by the Law of England, but not with us, as first settled in *Hislop v. Maxwell's Trustees*, 11th February 1834. The same was held in *Grierson v. Miller*, 3d July 1852, where a general testament was held sufficient to give the liferenter's legatee right to the liferented portion of the fee.

Powers of trustees.—There is a general presumption that the trustees are vested with the powers necessary to give effect to the trust; and there can be no doubt, therefore, that without special authority they will be entitled to take possession of the trust property, and perform every act of ordinary administration. In *Mure, &c. (Gilmour's Trustees) v. Gilmour*, 23d May 1851, the trust-deed being imperfect as a feudal conveyance, the trustees proceeded to make up their title by constitution and adjudication, and, although the heir was attempting to reduce the trust-deed, they were held entitled to decree of constitution *instantior*, because they had right by the conveyance to the beneficial possession. Should the heir obtain reduction, their title would then fall. With regard, however, to the sale or impignoration of the trust estate, these are acts of absolute dominion, proper only to an unlimited proprietor, or those whom he specially authorizes; and such extraordinary powers are not allowed to be exercised upon mere inference of intention, but must be conferred either by express terms, or by necessary and unavoidable implication. No one, however, will readily purchase lands, or lend money upon the security of lands, when the trustees have no express power to sell or borrow, because, however clear may be the necessity, and, therefore, the implied power, it does appear *per expressum* upon the face of the title; and even in the strongest case, therefore, judicial authority may be required. There is thus a manifest expediency, that such power should be conferred by express terms.

(1.) *Power of sale.*—This is an extraordinary act, amounting to the exclusion of the heir, and, where not expressed, therefore, it is only supplied in circumstances which do virtually exclude him, and ren-

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M. DOCS

"Clause,"

App^r. No. 6.

16 S. 374.

15 S. 1005.

POWERS OF
TRUSTEES.

13 D. 986.

EXTRAORDI-
NARY POWERS.POWER TO
SELL.

- PART III.
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F. C.
POWER OF SALE,
cont'd.
- 10 S. 438. der the sale indispensable to the preservation of the trust-property, and the attainment of the testator's purpose. In the case of *Trustees of Moore's Mortification v. Wilson*, 25th June 1814, trustees were allowed to sell the superiority of lands mortified for a charity. Here the power was granted in consideration of extraordinary advantage to the charity, the superiority being in itself useless to it, while the sale produced a price of £1000. But, in *Robertson v. Allan*, 7th March 1832, the Court of Session having upon strong presumption of intention to authorize a sale supplied that power, the decision was reversed 1st September 1835, Lord BROUGHAM holding, that the heir-at-law cannot be excluded or displaced by inference, but only by plain terms or necessary implication. Of the latter an example is furnished in *Henderson v. Somerville*, 22d June 1841, where power to sell lands not appointed to be sold was held to be necessarily implied, there being a running deficiency of funds, which, without a sale, would have consumed the trust-property. Where the primary purpose of the trust was payment of the testator's debts, it was found that the trustees had power to sell, in order to implement that purpose, and the heir being entitled to the residue of the rents, they were held bound to exercise the power of sale at his suit, so as to liquidate the debts out of the capital, and not pay them at the heir's expense out of the rents; *Graham v. Graham's Trustees*, 21st December 1850. Upon the same principle which limits the power of sale when not expressly granted, it is restricted to the precise terms used in conferring it when it was bestowed. Where a husband was empowered by his wife to sell, if necessary to his support, he made a sale in consideration of past kindness, and to secure a continuance of care and attention. The sale was reduced as going beyond the power; *Coltart v. Corie*, 26th March 1853. We ought to note in reference to the above case the danger of attempting novelties in Conveyancing. The deed was a conveyance to a third party, with power of sale reserved to the husband, and, as the property was the wife's, there was inserted a conveyance to the husband to make effectual his power of sale in the event contemplated. He took infestment to validate the attempted conveyance. The anomalies and difficulties inseparable from such a course would have been avoided by a trust.
- 13 D. 420.
- 15 D. 606.

When the conveyance is to the trustees and their assignees, and a power of sale is given, the precept of sasine, not being used by the trustees themselves, may be assigned by them, so as effectually to infest a purchaser notwithstanding the declaration of trust, which, according to the words of style, is usually repeated in the precept; *Cockburn v. Cameron*, 4th June 1836.

14 S. 889;
2 Ross, L. C.
460.

Care should be bestowed in framing the power of sale to avoid expressions which may be held to enjoin a sale. Heritable property directed by settlement to be sold for trust purposes is subject to legacy-duty. When there is no injunction, but a power merely, legacy-

duty does not appear to be exigible, unless a sale be necessary in order to accomplish the objects of the trust. In *Blair v. Blair*, 14th November 1849, it was decided, that a power of sale to trustees does not imply that the succession of heritage is to be treated as moveable, if there be no direction to sell. On the other hand, when a sale was necessarily contemplated by the testator, although no express power was given, notwithstanding an arrangement whereby the lands were conveyed by the trustees to the heir-at-law, the heritable property was held liable to legacy-duty; *Advocate-General v. Williamson*, 23d December 1850. To the same effect is *Advocate-General v. Smith*, 1st March 1852, where the rules and principles determining this point are stated. This case was affirmed on appeal.*

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12 D. 97.

18 D. 436.
14 D. 585.

1 Macq. App.
760.

(2.) *Power to purchase lands*.—When it is an object of the trust to invest the trust-funds in the purchase of lands, it has been found, *Sharpe*, 11th February 1823, that superiorities may be purchased, but there was no opposition in this case; and, in the subsequent case of *Governors of Cauvin's Hospital*, 29th January 1842, the Court declined to authorize a purchase of feu-duties, holding, that, when the direction is to purchase "lands," the *dominium utile* is meant.

POWER TO PURCHASE LANDS.
2 S. 203.

4 D. 556.

(3.) *Power to borrow*.—It is often very expedient, that trustees should possess this power, as, for instance, when immediate advances are required for the outfit, it may be, of children, but the trust property cannot be realized without a sacrifice. Power to borrow is sometimes raised like power of sale by necessary implication from the difficulty or impossibility of conducting the trust without it. But it is prudent, and most desirable, in order to enable the trustees and lenders to act with confidence, that a special power to borrow and grant securities should be inserted, whenever there is any probability that loans will be required. In *Dewar v. Ross's Trustees*, 4th December 1792, there was a power to borrow a certain amount, and a loan of a larger sum was sustained; but here the granter of the trust was alive, and had authorized the security and received the money. And, in *Thomson v. M'Lachlan's Trustees*, 24th June 1829, the fact of there being no power to borrow was one of the grounds upon which trustees were subjected personally in payment of a promissory note for £2500.†

POWER TO BORROW.
Bell's 8vo
Cases, 541.

7 S. 787.

* Where a testator does not merely give a simple power to sell the heritable estate, but confers upon his trustees an ample and absolute discretion whether they shall sell or not, he thereby makes the character of his succession dependent upon the resolution to which they may come in the exercise of that discretion; and if they, in exercise of their powers, convert the estate, legacy-duty becomes exigible; *Advocate-General v. Hamilton*, 22d February 1856. The Court were of opinion here, that, under the fair construction of 55 Geo. III. c. 184, Sch. Part III. there is a direction to trustees to sell, whenever there is a direction to them to consider as to a sale, and to do what they think best, supposing always that a sale is the course which they do adopt.

18 D. 636.

† The Court refused to authorize marriage-contract trustees to borrow money for repair of heritable subjects, no power to borrow having been given in the marriage contract, with the provisions of which the Court would not interfere; *Ker*, 3d March 1855.

17 D. 565.

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POWER TO
APPOINT FAC-
TORS.

(4.) *Power to appoint factors.*—Great inconvenience is frequently experienced from the absence of this power. Its object is to enable the trustees to devolve the management upon one or more persons able to bestow more time and attention upon the trust affairs than can be done by the trustees themselves. The advantage of such a power is manifest where any of the trustees may be permanently or temporarily resident abroad, and even, where the necessity is not so striking, it must always be beneficial to enable trustees under any circumstances which may exist or emerge to devolve the active charge and close superintendence and management upon persons who can apply to these the necessary time, trouble, and experience. The granter of the trust may himself name a factor, and the trustees have it not in their power to supersede the person so named; *Fulton v. M'Alister*, 15th February 1831. When no factor is named in the trust-deed, and no power to employ one is conferred, the trustees may employ one upon their own responsibility, but in such circumstances they do not enjoy an indemnity equally full as that which is usually provided, when authority to name factors is given. In a case, therefore, in which there was no power to name a factor, and a bequest was given to the trustees as a remuneration for their trouble, they were held personally liable for loss sustained through the failure of a factor, although reputed responsible when appointed; *Sym v. Charles*, 13th May 1830. If the employment of a factor be authorized, the trustees may depute to him even the power of sale, but, if they do so, the authority must be express, and not matter of inference merely, as in *Thomas v. Walker's Trustees*, 4th July 1829, where the authority was not to sell, but to grant dispositions, and generally to do everything which the trustees could do themselves. This, two of the Judges held to be an insufficient power, although a sale by the factor was sustained on the ground of the trustees having recognised other sales by him.

9 S. 442.

8 S. 741.

7 S. 828.

POWER TO
ASSUME.

(5.) *Power of assumption.*—It is highly expedient, where the purposes of the trust render its long duration probable or certain, that the trustees should be enabled to recruit their ranks by assuming others. This is done, by giving them power to nominate and assume such other person or persons as they shall think fit, who shall have the same powers and privileges as the original trustees. The title of assumed trustees is completed by deed of assumption, whereby they are formally nominated and appointed, and the trust property is conveyed by the original trustees, or by such of them as survive, and are capable to execute the conveyance, in favour of themselves and those whom they have assumed, with power to the survivors and quorum as in an original trust. The deed of assumption must contain procuratory and precept, and the title will be completed by infeftment. When a power of assumption is conferred, it may be exercised even on deathbed; *Roughhead or Tod v. Hunter*, 5th March 1833; but no assumption can be made when it is not authorized; and whatever

11 S. 516.

power is given must be executed in strict conformity with its terms. So, where the power was merely to supply places in the trust vacant by death or non-acceptance, and there were two such vacancies, an assumption of three new trustees was found void as to all the three, this being an excess which the Court cannot correct; *Ferrie v. Baird*, 31st May 1834. Sometimes a power of nomination is given not to the trustees alone, but to a party beneficially interested with their consent. In *Baillie or Dunlop*, 11th March 1835, power having been given to a beneficiary to name new trustees with consent of a majority of those acting for the time, and the trustees having all died, the beneficiary was found entitled to nominate by himself alone.

But, although there be no power of assumption, the trust will not be defeated by the failure of all the trustees. The Court of Session by its *nobile officium* will provide for the execution of it. In *M'Aslan*, 17th July 1841, the trustees having all died, the Court with the concurrence of all concerned appointed new trustees. It is only the proprietor himself, however, who can confide to another the absolute control of his property without security; and in this case, accordingly, the trustees appointed by the Court were required to find caution. A judicial factor is now generally appointed, where testamentary trustees fail, and he also must find security. It is thus a clear duty to provide against a total failure of trustees deriving their nomination from the granter himself, or under powers conferred by him; and care also should be taken to obviate such contingencies as suspend the operation of the trust without permitting a remedy. See *Duncan*, 23d June 1849, where two trustees having died, and the remaining two being abroad, the Court refused to appoint a judicial factor. The advantage of a timely assumption is also shewn by the inconvenience experienced from the absence of trustees reducing the number resident to less than a quorum; *Nisbet v. Fraser*, 31st January 1835. Here, one of two accepting trustees went abroad, and the other continued to act in collecting and reinvesting funds. The trust-deed, however, contained a power of assumption, with a recommendation by the testatrix that it should be exercised so that the number of trustees should never be less than three. The proceedings of the acting trustee having been challenged, the Court was of opinion, that the power of assumption ought to have been exercised, and, holding the right of the one trustee to be doubtful, superseded him by appointing a judicial factor.

If any one undertake the office of trustee without any appointment or assumption, the extent of his powers depends upon the provisions of the trust under which he professes to act; and, in *M'Millan v. Armstrong*, 6th December 1848, a party so acting, where the deed conferred no power to borrow, was held personally liable for the amount of a loan contracted, in so far as shewn not to have profited the beneficiaries.

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JUDICIAL AP-
POINTMENT OF
NEW TRUSTEES,
OR JUDICIAL
FACTOR.
3 D. 1263.

See *infra*, p.
687.

12 D. 913.

13 S. 384.

11 D. 191.

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POWER TO COM-
PROMISE AND
SUBMIT.

(6.) *Power to compound and submit.*—This is another power essential to the satisfactory administration of a trust, but which cannot safely be assumed, if not expressly conferred, inasmuch as compromise and arbitration are acts proper only to an absolute proprietor. They ought invariably, therefore, to be authorized.

LIABILITY FOR
EACH OTHER.

Inst. i. 7, 20.

5 S. 346.

5 S. 852.

Liabilities of trustees.—They are liable for the intromissions of each other, unless the granter of the trust expressly exempt them. This rule is laid down by Erskine with regard to tutors and curators, and it was applied to a trustee in *M'Clymont v. Hughes*, 14th February 1827, where an accepting trustee was subjected in payment of funds received, not by himself, but by a co-trustee. The case of *Kennedy v. Wightman*, 28th June 1827, is to the same effect, and presents the doctrine in a clearer illustration.*

LIABILITY FOR
THEIR FACTOR.*supra*, p. 682.

16 S. 560.

We have already found an instance of trustees being subjected for loss by a factor appointed without authority from the testator. In that case, however, they had received by the settlement a bequest in remuneration of their trouble. It cannot be laid down as an invariable rule, that trustees are liable for factors appointed without authority. In *Thomson v. Campbell*, 16th February 1838, the business of the trust not being manageable without a factor, the appointment of one was held to be an act of ordinary administration; and, while it was alleged that loss might have been avoided by their taking security from the factor named, it was held a sufficient answer, that he was habit and repute solvent at the date of his appointment, and that it is common in practice to name factors without taking caution. In this case, however, the amount lost by the factor's failure was not large in proportion to the magnitude of the trust, and there was no allegation of negligence.

CLAUSE OF
PROTECTION
AGAINST LIABIL-
ITY FOR OMIS-
SIONS, &c.

M. 3534.

In order to encourage trustees to accept of the office, it is usual in trust-deeds to insert a clause of protection, by which it is declared, that they shall not be liable for omissions, errors, or neglect of management, or *singuli in solidum*, but that each shall be liable for his own actual intromissions only; and, that they shall not be liable for factors further than that they were habit and repute responsible at the time of appointment. The importance of this clause is shewn by its effects in *Dalrymple v. Murray*, 4th August 1784. In that case there were two factors in succession, who grossly counteracted the objects of the trust by neglecting to pay debts and legacies, and largely overpaying the residuary legatee. A special legatee sued the trustees personally, but they were held to be exonerated by the clause

17 D. 1151.

* When an original trustee divests himself of the trust and assumes new trustees in his room, the latter are assumed into the management of the whole trust, and are bound to state in account the intromissions of their predecessors, as well as their own; *Somerville's Trustees v. Wemess*, 8th December 1854. Here, however, all questions as to the liability of the assumed trustees for their predecessors' intromissions were reserved.

of indemnity. The case of *Lord Traquair's Trustees v. Anstruther's Trustees*, 6th February 1835, as noted by Mr. Bell in his Illustrations, is another example of trustees being screened by the clause of indemnity from liability for loss resulting from great negligence, though each had received £500 as a mark of friendship, and £105 to buy a hogshead of claret for their trouble, they having allowed their factor to act without keeping accounts, and to fail with more than £6000 in his hands. In *Graham v. Hunter's Trustees*, 4th March 1831, trustees were found not liable for loss sustained by their agent's failure to search the records, and discover a prior burden affecting lands upon which the trust funds were lent.

The clause of indemnity, however, does not exempt from all responsibility. The subscription of receipts is intromission, and trustees subscribing are personally liable for the misapplication by any of their number of the money so discharged; *Blain v. Paterson*, 28th January 1836. In the 12th volume of Dunlop's Reports, the unreported case of *Gray v. Kennedy, &c.* in 1819, is noticed by Lord MONCREIFF, in which Lord GILLIES and the Court found, that, where the complaint was that trustees had uplifted trust-funds from an heritable security, and lent the amount on personal security to one of their own number, the act of a trustee, who had never touched a farthing of the money, in signing a discharge of the heritable security must be taken as an actual intromission by him in terms of the protecting clause. Trustees are personally responsible, also, for not acting in conformity with the testator's instructions; so, where they resisted a specific demand that the funds should be invested in government stock as expressly directed, they were subjected personally in damages for loss of what would have been gained by a rise in the funds, and that, although their refusal was advised by counsel; *Morrison v. Miller, &c.* 5 S. 322. (*Morrison's Trustees*,) 9th February 1827; and, in *The Bon-Accord Marine Insurance Co. v. Souter's Trustees*, 11th December 1850, the instruction being to invest on good heritable or personal security, the purchase of a redeemable annuity with a policy of insurance was held not to be an investment in terms of the instructions, and, upon a sale of the bond of annuity a loss having been sustained, the trustees were held personally liable for it.* They must make up, also, from

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ii. 563.

9 S. 543.

LIABILITY FOR
INTROMISSIONS.

14 S. 361.
p. 209.

13 D. 295.

ERRONEOUS
PAYMENT BY
TRUSTEES.

* A truster at his death had his funds in the hands of a mercantile firm, two partners of which he appointed his trustees, and directed them to invest his funds in a certain way for the purposes of the trust. Instead of doing so, they continued to employ them in the firm, paying the beneficiaries 5 per cent. interest. Whenever they were called upon, they invested the funds as directed, and there was no suspicion of *mala fides*. The Court held, that the beneficiaries were entitled to claim the profits realized by the trustees out of the employment of these funds, over and above the 5 per cent. which they had paid; *Cochrane v. Black*, 1st February 1855. The question was reserved, whether the beneficiaries' claim was confined to the share of profits effeiring to the trustees' interest in the partnership, or whether the trustees were personally liable to account to them for the entire profits made by the firm out of the trust funds.

See also the case of *Laird v. Laird*, 26th June 1855, which is similar to that of *Cochrane*, 17 D. 984.

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13 S. 725.

their private funds whatever trust-money they pay to a wrong party. In *Macfarlane v. Donaldson*, 12th May 1835, the share of a legatee was paid to a party who had been appointed her *factor loco tutoris*, but, having failed to find caution, had never obtained extract of his appointment, without which he had no authority to intromit. Upon his bankruptcy the trustees were found personally liable. So, also, a year's interest having been paid to the heir, to which he was not legally entitled, the trustees were ordained to make it up to the trust from their private funds; *Macpherson v. Tytler*, 19th January 1850. Trustees are also bound to indemnify from their private means loss sustained by others through reliance upon their conduct and representations. So they are not only subject, like other parties, to expenses of litigation awarded against them as trustees, as in *Dickson v. Bonar's Trustees*, 20th November 1829, and in *Nicol v. Cameron*, 19th June 1829, where trustees were subjected in expenses for having refused to exhibit the trust-deed to a party having an interest; but they will also be subjected personally in payment of expenses, if they litigate *malâ fide*, as in *Robertson v. Morrison & Others*, 4th December 1823, where, there being no trust funds, they were decerned against individually, because, being the pursuers of the action, they had no right to put the defender to an expense which they could not reimburse. Again, an action of damages for seduction having been defended by the trustees of the party charged, they were subjected personally in expenses, because a perusal of the correspondence would have shewn them that the claim was well founded; *Kay v. Wilson's Trustees*, 6th March 1850.

12 D. 486.
TRUSTEES PERSONALLY LIABLE FOR EXPENSES OF *malâ fide* LITIGATION.
8 S. 99.
7 S. 777.

2 S. 553.

12 D. 845.

TRUSTEES ALWAYS LIABLE FOR GROSS NEGLIGENCE.
7 S. 787.

13 S. 870.

4 D. 310.

13 D. 44.

They are bound to retain funds sufficient to liquidate the obligations which they grant; *Thomson v. M'Lachlan's Trustees*, 24th June 1829. Here there was a promissory note for £2500, granted when the trust funds were ample, to a party who relinquished an heritable security. The trust estate having been dilapidated, the trustees were compelled to pay the note. And, in fine, notwithstanding the clause of indemnity, trustees are liable for very gross negligence and misconduct. In *Mayne v. M'Keand*, 4th June 1835, the husband of a legatee having been employed by the trustees to prepare a security by himself for the amount of the legacy which was lent to him, and loss having accrued from his failure to infest them, they were held personally liable, the act being accounted not an omission, but a culpable and unauthorized devolution; and, in *Seton v. Dawson*, 18th December 1841, trustees having allowed trust funds to remain for eight years in the hands of one of their number, who was not factor, whereby loss was sustained, this was held to be *culpa lata*—gross negligence, not sheltered by the clause of indemnity. In *Ross v. Allan's Trustees*, 13th November 1850, trustees having lent tempo-

and illustrates the great principle, that no one applying the funds of another for the purpose of profit can himself appropriate the benefit.

rarily to a husband part of a fund expressly exempted from his *jus mariti* and right of administration, and declared not affectable by his creditors, and having taken no other security than his bill, which they neglected to recover when it became due, and the husband having after eight years become bankrupt, the trustees who granted the loan were held liable personally for the amount at the suit of a co-trustee, not a party to the transaction.

The trust-disposition contains a reserved power to alter, revoke, and annul. The importance of this in giving effect to deathbed deeds made under the reserved power we have already pointed out. There is also a reservation of the grantor's life interest, which, according to the rules respecting the delivery of deeds, would exempt the *mortis causa* disposition from the necessity of delivery. But, in order entirely to exclude all objection on that ground, there is universally inserted a clause dispensing with delivery, and declaring the deed effectual though found lying by the grantor undelivered at his death.

It is unnecessary to refer to the ordinary clauses for completing the feudal transmission. These will, of course, be inserted, when it is intended to enable the trustees to obtain a feudal title by warrant from the testator. If there be procuratory and precept, we have already seen, that these will furnish the means of infeftment, even in lands generally conveyed without special description, by producing the sasines of the deceased along with the trust-disposition to the notary.

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RESERVED
POWER TO RE-
VOKE.

RESERVATION
OF TRUSTEE'S
LIFE INTEREST, AND
DISPENSATION
WITH DELIVERY.

supra, pp. 540,
556.

In order to render the trust effectual after the grantor's death, the trustees or a sufficient number of them must accept, and, in order to vest them feudally with the heritable property, they must be infeft. Even if all the trustees should decline the office, that will not make the trust void. Their appointment was instrumental only to the attainment of the grantor's will, and, if his intention can be fulfilled, notwithstanding their declinature, the Court will provide the means of executing it; *Campbell v. Lord Monzie*, 26th June 1752. We have already had an example of trustees appointed by the Court, where all concerned concurred. In *Tovey v. Tennent*, 11th March 1854, a trustee named *sine quâ non* in a marriage contract having refused to act, the Court gave decree declaring that the nomination had fallen, and authorizing the parties to the contract to appoint new trustees with the same powers. The surviving trustees originally named, and the children of the marriage, were made parties to the action, and the judgment was given in respect of a previous decision to the same effect; *Lindsay v. Lindsay*, 19th June 1847. If the parties are not agreed, or if, from absence of the trustees, or their incapacity, or malversation, the trust has become inoperative, the Court will not appoint new trustees, but they nominate a judicial factor.

CONSTITUTION
OF TRUST, AND
MEANS OF CAR-
RYING IT INTO
EFFECT AFTER
THE GRANTOR'S
DEATH.

DECLINATURE.

M. 14,703.

supra, p. 683.
16 D. 866.

9 D. 1297.

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14 S. 1112.

16 D. 867.

16 D. 941.

ACCEPTANCE
NOT PRESUMED.POWER TO RE-
SIGN.i. 450, 3d Edⁿ.

See the cases of *Harvey or Lacy v. Lacy*, 7th July 1836; *Fraser or Stott*, 11th March 1854; *Watt*, 13th June 1854.*

A trustee's acceptance is not presumed without his authority or acquiescence, and he is not, therefore, committed by the passing of infestment in his favour, if not sanctioned or homologated by himself.†

After acceptance the general rule is, that a trustee cannot withdraw, unless he is empowered by the trust-deed to resign. In the Juridical Styles there is the form of a provision for discharging trustees who wish to retire, and the representatives of deceased trustees; but the expediency of such a provision is not clear. It is generally better, that, when difficulties approach, men should feel themselves forced to encounter and overcome them, than that they should be enabled to fly from them; and the necessity of going through with the matter presumes deliberation and resolute purpose before

2 Hailes, 678.

acceptance. Of the general rule there is an example in *Carstairs*, 20th January 1766. Here three trustees petitioned the Court, on account of their age and infirmity, and ignorance of business, to name other trustees or a factor; but the Court refused, the Lord President observing, that trustees must not imagine that, whenever they are tired of their office, they can slip their necks out of the collar, and leave the matter to be extricated by the Court. Another instance of a trustee not permitted to withdraw after acceptance will be found in *Logan v. Meiklejohn*, 26th May 1843; and, in *Gordon*, 2d June 1854, it was held incompetent for the Court to exoner trustees, and doubtful, whether resignation could be allowed without intimation to all the beneficiaries, as well as to the co-trustees. While this is the general rule, and what ought to be counted on by any one accepting a trust, it is subject to exceptions, and the Court will relax it

5 D. 1066.

16 D. 884.

* Special powers were granted to a judicial factor to make up titles and to sell for the purpose of carrying into execution a lapsed trust, under which the trustees had full powers of sale conferred upon them; *Morison v. Wedderspoon*, 1st December 1855. A title in his own person is not necessary in order to enable a *factor loco tutoris* to convey heritage belonging to his ward, because he, as guardian, comes in place of the ward, and exercises the will or consent of the ward. So, in *Scott*, 21st February 1856, power was given to a *curator bonis* to convey his ward's estate, though the feudal title had been completed in the ward's person. But there is a distinction between such a case and that of a judicial factor upon a trust-estate, where the trust has lapsed through the failure of the trustees. Here, it is necessary that the title be made up in the person of the judicial factor to enable him to grant a conveyance, for there is no ward in whose person the title could be made up. The title is in abeyance, and the judicial factor must be authorized to make up a title in his own person, in order to administer the trust, whereupon he occupies the place of proprietor as the trustees would have done. So, a judicial factor having been appointed on a lapsed trust, which consisted chiefly of heritage, he was authorized by the Court to make up titles in his own person in order to enable him to manage and sell the estate, in *Meikle*, 4th June 1856.

18 D. 132.

18 D. 624.

18 D. 988.

† Acceptance will not be inferred, or liability for loss of trust-funds incurred, by mere knowledge of the existence of the trust-deed, attending the first meeting of trustees, and writing the minutes, but expressly declining "to give any opinion or vote, or to incur any responsibility;" *Mitchell v. Davidson*, 20th December 1855.

18 D. 284.

where strong reasons are shown, as absence and bad health, accompanied by the consent of all concerned, upon which grounds a trustee's resignation was approved of in *Hill v. Mitchell, &c.*, (*Hill's Trustees*), 9th December 1846.*

Accepting trustees, who are also tutors and curators must make inventory of a pupil's effects, under the penalty of accounting upon the penal terms prescribed by the Act 1672, cap. 2; *Mollison v. Murray*, 19th December 1833.

When a trustee accepts, there is implied an agreement that he will submit to the opinion of the majority. He can, therefore, be compelled to concur in all lawful and necessary acts of administration which cannot be done without him, as in uplifting trust-funds; *Lord Lynedoch v. Ouchterlony*, 15th February 1827, affirmed 7th July 1830. In a subsequent stage of this case, 20th November 1832, the recusant trustee was found liable in loss of interest sustained through his refusal to act. The Court will interfere also for the security of the trust-estate, when there is risk from the bankruptcy of trustees. In *Smith*, 15th May 1832, a sole trustee having become bankrupt was interdicted from intromitting, a factor appointed, and the trustee ordained to convey the trust property to him; and, in *Barry v. Thornburn*, 11th March 1847, two of three trustees having become insolvent, and the circumstances being such as were calculated to excite distrust, the Court ordered them to find caution, and, upon their failure to do so, sequestrated the trust-estate, and appointed a judicial factor.

In other circumstances of difficulty, the Court has interfered to provide a remedy. In *Fraser*, 1st March 1837, the nomination was of three trustees and the survivors and survivor; one died, and another having become insane, the third applied to the Court for full powers to bring the trust to a conclusion by paying over to the beneficiaries. Authority was granted accordingly, but only, as in the case of *Macaslan*, upon caution being found.

Termination of trust.—When the testator's purposes are accomplished, the trust is brought to an end by transferring the property to those beneficially entitled, and by their granting, on the other hand, a discharge and exoneration in favour of the trustees. The trustees must account at the suit of the fiar of the trust property and his representatives; *Home v. Home*, 27th May 1712; and, when the fiar's right is complete, and there is no longer any bar to a conveyance in his favour, the trustees are bound to denude; *Allan v. M'Rae*, 25th May 1791. It was so found, where all interested were *sui juris*; *Craigies v. Gordon*, 17th June 1837; *Annandale v. Macniven*, June 1847; *L'Amy v. Neilson's Trustees*, 5th December 1850. But such an arrangement

* An example of one of three surviving and accepting trustees under a trust deed, which did not specify any number of trustees as a quorum, being liberated from his office on the ground of delicate health, will be found in *Pridie*, 9th June 1855.

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must be consistent with the testator's intention. Where the terms used by him are distinct and positive, conjecture and inference are excluded; and, where the interest of a sum was given to the children of A., and the principal at the first term after his death, the residue being payable, after completion of the purposes, to the testator's nearest relations then alive, the children having discharged the legacy, A. claimed the trust-funds as the nearest relation alive. But the Court held that this claim could not arise till after his death; *Scott v. Scott*, 14th August 1850.*

7 Bell's App.
143.

SUBSTITUTION
OF HEIR-AT-LAW
OF LAST
TRUSTEE.

Trust deeds generally substitute to the last survivor of the trustees his heir-at-law, who may, accordingly, make up a title to the property, and execute the trust. Should no such provision be made, or should it be unavailing at the time from the pupillage of the trustee's heir, or other cause, then, if every other purpose of the trust has been accomplished, the Court will, at the suit of the residuary legatee, declare the trust at an end, and grant adjudication in his favour, and warrant for vesting him in the trust property; *Dalsiel v. Henderson and Dalsiel*, 11th March 1756; *Drummond v. Mackenzie*, 30th June 1758. Here, the party having the beneficial interest was authorized to raise an action of declarator and adjudication, calling every party who should appear to have an interest, in order that the subject might be adjudged to him to make the trust purposes effectual.

DECLARATORY
ADJUDICATION
IN FAVOUR OF
BENEFICIARY.

M. 16,204;
1 Ross, L. C.
324.

M. 16,206;
1 Ross, L. C.
327.

GENERAL DIS-
POSITION,—
EFFECT OF.

The General Disposition.—This form of settlement is very concise, containing merely a general conveyance of all property, heritable and moveable, to the intended donee, under burden of the grantor's debts, with an obligation to infest, and to grant all supplementary deeds necessary—a nomination of the donee as executor—and a reservation of the grantor's liferent, with power to alter, and dispensation with delivery. The examination already made of the different forms of settlements renders it unnecessary to comment upon this. It is effectual to attain the grantor's purpose, not as an instrument of complete feudal transmission, but as a conveyance of the right, to be made complete by adjudication in implement.

2 S. 146. There is a striking example of the operation of a general disposition in the case of *Steele v. Young*, 23d January 1823. Here, there was a special disposition by a parent in such terms as not to give a fee to his two daughters. Assuming, however, that they were fiars, they made up no title, relying on the infestment which the father had expedite, and, upon the death of one of them, the survivor, having entered as heir to her sister, disposed to a purchaser. After her death the next heir served to the father, and challenged the purchaser's right as flowing a *non habente potestatem*; and he would have prevailed, but that, besides the special disposition, the deed contained a general conveyance to the daughters of all their father's heritable

16 D. 667.

* See remarks of Lord Justice-Clerk Horne in *Pretty v. Newbigging*, 2d March 1854.

property in such terms as to give them a right of fee, and this right having been assigned to the purchaser by the terms of his conveyance "with all right," &c., he was entitled to sue the heir-at-law to enter and convey; the maxim applying:—*Frustra petis, quod mox es restitutus*.

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The general disposition, however, is a complete transference to this extent, that it is equivalent to a general service, and will, therefore, transmit personal rights to heritable subjects, such as bonds secluding executors; *Grant v. Grant*, July 1718. It is, therefore, effectual, and so held in practice, to transfer right to unexecuted procuratories and precepts. An example of this important practical rule is presented in *Melvin v. Dakers*, 17th June 1843.

M. 14,377.
5 D. 1217;
2 Ross, L. C.
424.

As the general disposition includes the moveable estate, we may remark here, that it forms a complete title to the deceased's moveable effects which were in his possession, but the general donee requires confirmation as a title to recover from other parties. *Richardson v. Shiells*, 19th February 1784. Here an executor creditor confirmed was held to have right to a bond owing to the deceased in preference to a general donee; and adjudication obtained by a general donee is void, unless his title be previously completed by confirmation; *Arbuthnot v. Cockburn*, 27th November 1789.

GENERAL DIS-
DONEE REQUIRES
CONFIRMATION.

M. 14,377.

M. 14,383.

3. The Entail.

Entails were a necessary consequence of the feudal system, and of the law of primogeniture, which was indispensable to the maintenance of that system. The object being to perpetuate estates in the same families, the purpose of the entail is to determine, throughout the future succession, what particular person shall be the proprietor to the exclusion of all others, and so to limit his powers of disposal and administration, as to prevent alienation or mortgage of the estate during the successive generations. Thus, by the limitation of the succession to one heir, the estate is preserved from dispersion by being divided, and it is secured against dilapidation and alienation by the fetters imposed upon every succeeding proprietor. This restraint upon property was practised by the Romans, who were entitled, through the medium of *fideicommissa*, to limit the succession to a fixed series of heirs through four generations. The same practice, from its natural coincidence with the principles of the feudal system, obtained a footing, under various modifications, in the different countries of Europe. In England, the law of entail assumed very nearly its present form during the reigns of Henry VII. and Henry VIII. The practical effect as regards the power of making an entail in England is, that a proprietor may entail his estate upon such heirs as are in existence when the deed is executed, or until the first unborn heir of entail shall attain the age of twenty-one. This state of the

INTRODUCTORY
REMARKS.

PART III. law has been characterized as attaining the most desirable medium,
 CHAPTER III. "by giving to every individual that degree of power over the disposal
 Smith's Wealth "of his property, which is necessary to inspire him with the desire
 of Nations, iv. "of accumulating a fortune; at the same time that it takes from him
 444. "the power of naming an indefinite series of heirs, and of fixing the
 "conditions under which his property shall be always enjoyed." In
 Scotland, although attempts were made to subject estates to the fet-
 ters of entails at an earlier period by the private act merely of the
 granter, it is agreed by our best Lawyers, that they are entirely
 founded upon statute, and had no sufficient authority until the Act
 1685, c. 22. 1685, cap. 22, was passed to give them a legal sanction. We shall have
 ample occasion to observe that this is a species of settlement, which,
 while extensively practised, has always been regarded by philosophical
 writers with disfavour, and has been subjected, in the Courts of Law,
 to rules of severe criticism, in order to preserve the freedom of pro-
 perty, wherever the fetters imposed betray the slightest defect.
 These are the sentiments, combined with the inconveniences expe-
 rienced by the families of those whose properties are thus fettered,
 which have led to the enactment of the recent Statute for amending
 the law of entail, by which Statute the power of entailing for the
 future has been restricted to a nearer conformity with the English
 system, supposed, as we have seen, to have nearly attained perfection.

The word *Entail*, or *Tailzie*, is derived from the French "*tailler*," to cut, and it expresses an act or deed by which the legal line of suc-
 cession to a property is cut off, and an arbitrary series of heirs fixed to
 take the inheritance in their order to the exclusion of the heirs at
 law. The term has thus a wide application, and is used by Mr.
 Erskine as descriptive of all deeds which alter the legal order of suc-
 cession. These he divides into three classes:—

SIMPLE DESTI-
 NATIONS.

(1.) *Simple destinations*, i. e., deeds which contain merely a series
 of heirs without any prohibition against altering it. So long as a
 simple destination is not altered it receives effect, but any heir may
 alter it gratuitously, and the heirs substituted to him have no power
 or means of interference to prevent the exercise of that right.

ENTAILS WITH
 PROHIBITIONS,—
 EFFECT OF.

(2.) *Entails with prohibitions*.—The next class of entails comprehends
 deeds which contain not only a particular order of succession, but
 prohibitions designed to preserve the estate to the heirs so called.
 For this purpose the deed provides, that the heir in possession shall
 do nothing to alter or innovate the order of succession. That is
 sometimes the only prohibition; but there may be added prohibi-
 tions against alienating the property, and contracting debt upon it.
 These are called entails with prohibitions, and they were sufficient
 to protect the heirs-substitutes against the gratuitous acts of the
 heir in possession. He might sell for a price, because there was no
 irritant or resolute clause, or he might grant a valid security for

money truly lent to him ; but he could not gratuitously, and without an onerous cause, change the order of succession, or dispense, or burden with debt. PART III.
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The entail, or, as it is also called, the disposition with prohibitions, as it protected the heirs-substitutes against the gratuitous acts of the heir in possession, so it conferred upon the substitutes the character of creditors, which entitled them to reduce deeds granted gratuitously to their prejudice under the Act 1681, cap. 18. In the case of *Earl of Callander v. Lord John Hamilton*, 1st December 1686, it was decided, M. 15,476. that a prohibition, though not guarded by an irritancy, was sufficient to reduce gratuitous or voluntary deeds, not depending on previous onerous causes. This doctrine underwent careful investigation, and was confirmed in the court of last resort, in the case of *Carrick v. Buchanan*, which we shall presently have occasion to cite. The prohibition, however, was effectual only for the purpose for which it was expressly designed ; and a prohibition of one act was not extended so as to prevent another. Therefore, lands destined to Anne Irving and a substitute, with a prohibition as to her power of sale, but none against her changing the succession, were held to be validly disposed of by her *mortis causa* disposition altering the order of succession ; *Maxwell, &c., v. Gracie*, 7th June 1822. The successive heirs being 1 S. 471. also the fiars of the property, they might, accordingly, as already stated, burden it with debt, or alienate it for an onerous cause, so as to terminate their own right, and defeat that of all the subsequent heirs ; *Young v. Bothwells*, 7th December 1705. The principle is, that a M. 15,482. mere prohibition against selling or altering the succession only imposed a personal obligation upon the heir, and had no effect against creditors or purchasers, because it was not directed against them, either directly, or by striking against the title which they acquired, or against that of the seller from whom they acquired it. So entirely did the heir in possession under a disposition with prohibitions possess the powers of fiar, that the substitutes could not protect themselves by inhibition against his onerous deeds, such deeds being effectual even when granted after the inhibition was used, because, by the terms of the title, the heir in possession is fiar, and, alienation not being precluded by effectual conditions, no diligence could supply that defect ; *Bryson v. Chapman & Barrie*, 22d January 1760. M. 15,511.

These were the rules before the Entail Amendment Act ; and as EFFECT OF EN-
TAIL AMEND-
MENT ACT UPON
ENTAILS WITH
PROHIBITIONS. that Statute is now held to control entails of this modified description, none of the prohibitions are valid and effectual under the Act 1685, and the estate is therefore held, under the forty-third section of the recent Statute, to be a fee-simple estate in the person of the heir in possession, and subject to his deeds and debts ; *Ferguson v. Ferguson, &c.*, 18th November 1852. An entail was here held inoperative in 15 D. 19. terms of that section, because the irritant clause did not refer to the prohibition to alter the order of succession. It was pleaded that this

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14 D. 636. being a prohibition against a gratuitous deed was sufficiently fenced by a simple prohibition. But Lord FULLERTON observed, that alteration of the order of succession is not always or necessarily gratuitous—as, for instance, in the case of a marriage contract. The previous cases of *Dick Cunyngham v. Cunyngham*, 9th March 1852, and *Dewar v. Dewar*, 20th July 1852, are to the same effect.

14 D. 1062.

STRICT ENTAILS.

(3.) *Entails with irritant and resolute clauses*.—The remaining kind of entails consists of those which contain irritant and resolute clauses. In these there is not merely a prohibition against doing certain acts, but that prohibition is fortified by two specific conditions: first, an irritancy, *i. e.*, a declaration, that anything done in contravention of the prohibition shall be null and void; and second, a resolute clause, *i. e.*, a provision that, upon the granting or doing of anything in contravention of the prohibitions, the title of the grantor shall be resolved, *i. e.*, destroyed or brought to an end, so that the act done in contravention can have no efficacy, because derived from one whose title perished in the very doing of it. These three things, *viz.*:—The prohibition—the irritancy—and the resolving of the grantor's right, must all concur in order effectually to fetter the heirs, and debar them from exercising the rights of fee-simple proprietors.

OBJECT OF ACT
11 & 12 Vict.
c. 36.

By the Entail Amendment Act, 11 and 12 Vict. cap. 36, very important, and, in some respects, fundamental, alterations have been introduced into the law of entail. These alterations have two grand objects, *viz.*, on the one hand, to qualify the effect, and regulate the form, of entails made after the 1st August 1848; and, on the other, to confer upon parties possessing under entails made before that date certain powers to convert their right into fee-simple, and to introduce certain qualifications in the construction of these old entails, and grant facilities in charging the lands held under them with family provisions, and for other necessary purposes. Subject to these modifications, however, the old entails are still effectual, and it is necessary, therefore, to examine them, since without a correct knowledge of their form and effects, we cannot be prepared to act with confidence or security in matters relating to the purchase, succession, or other disposal of property held under that title. The subject thus divides itself into two great heads, *viz.*:—1. *Old Entails*, including all made prior to 1st August 1848; and 2. *New Entails*, or such as are dated on or after 1st August 1848.

Old entails.

ENTAILS AT
COMMON LAW.

M. 13,994.

The practice of entailing lands was known in Scotland before it received legislative authority; but entails thus depending upon the common law were never held to be effectual excepting in the single case of *Viscount Stormonth v. Creditors of Annandale*, February 1662. Here, the resolute clause having been engrossed *verbatim* in the sasine, that conditional annihilation of the contravener's right

was held to be published, and equivalent to an interdiction. Doubts, it is presumed, of the soundness of this judgment, combined with a strong opinion of the desirableness of the measure, led to the enactment of the Statute 1685, cap. 22, prepared by Sir George Mackenzie.

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That Act made it lawful to His Majesty's subjects to tailzie their lands and estates, (which terms include burgage tenements as well as large properties; *Dillon v. Campbell*, 14th January 1780;) and to substitute heirs in their tailzies with such conditions and provisions as they should think fit, and to affect them with irritant and resolute clauses producing these three effects, viz, (1.) That it should not be lawful to the heirs to sell the lands; or (2.) to contract debt; or (3.) to alter the order of succession. Such acts are to be declared null and void; and upon contravention the next heir may pursue declarator, and serve himself heir to him who died last infest in the fee, and did not contravene, without requiring to represent the contravener. In forming a conception of the scope of this Statute, we must keep in view its design, viz, to preserve the estate entire through successive generations. That could only be done by exempting it from all the legal rules and liabilities which render property subject to division, or responsible for the owner's obligations. The permission to tailzie prevents division by rendering legal the exclusion of heirs portioners; and, by restricting the succession to the precise line marked out, the ordinary rules of inheritance are excluded. The prohibitions against selling and contracting debt exempt the lands from alienation and mortgage; and these restrictions are reconciled with the rule of property, by making the contravention of them import a dissolution of the contravener's right, operating backwards so that the act of contravention is void as flowing from one whose right was extinguished before the act. But how was the next substitute to avoid the law of representation, which subjects the heir in performance of all his ancestor's obligations? This was accomplished by a fiction of law, annulling the title of the contravener *ab initio*, and passing him over as if he had never existed, the next heir serving not to him, but to the last heir who was vested, and did not contravene. How, again, were these violent inversions of the ordinary rules of succession and responsibility in connexion with property to be reconciled with the just rights of third parties—of creditors contracting with the owner, and on the faith, it might be assumed, of the ownership? This was effected by notice of the disabilities, given not only through a register of tailzies established by the Statute, and in which an entail must be recorded in order to be effectual, but also through the registers for publication, the insertion of the fetters being rendered imperative, both in the title first made up under the entail, and in all the subsequent conveyances, under this sanction, that the omission should import a contravention. The lieges were thus made

GENERAL EFFECT OF 1685,
C. 22.
M. 15,432.

PART III. aware, that the right of the party in possession extended to a life
CHAPTER III. interest merely, and that he had not the powers of disposal and
 impignoration of a fee-simple proprietor.

These general views will facilitate the understanding of the Deed of Entail, the terms of which we shall now shortly review.

**TITLE OF MAKER
OF ENTAIL.**

16 S. 184;
2 Bell's App.
214; 2 Ross,
L. C. 435.

Any one may make an entail. The power is given by the Statute to "His Majesty's subjects" without restriction; nor is it necessary that the maker have a title feudally completed, possession upon a personal right being sufficient. In *Renton v. Anstruther*, 5th December 1837, affirmed 18th August 1843, a person, having a personal right by a disposition from his sister containing a procuratory of resignation, made an entail with a general assignation of writs. This was held to form a sufficient entail, and to confer right upon the entailer's heir to make up his title by using the unexecuted procuratory. This case also shews, that an entail may be validly altered and added to by a subsequent deed. The sufficiency of a personal right as a title to make an entail was decided also in *Fogo v. Fogo*, 25th February 1840, affirmed 18th August 1843.

2 D. 651.
2 Bell's App.
195.

**FORM OF
ENTAIL.**

An entail may be made in various forms. It may be by a disposition and deed of tailzie, containing all the clauses requisite for an effectual feudal transmission, with the prohibitions and clauses irritant and resolute embodied. In practice, entails are frequently made in the form of a procuratory for resigning the lands for new infestment to be issued by the superior in favour of the entailer and the heirs appointed, under the conditions of the entail. An entail may also be made in the form of a bond of tailzie, binding the granter and the heirs to hold under the conditions specified; or it may be contained in a contract of marriage. In whatever form it is made, the essential requisites are the same. It must settle the destination, describe the lands, and impose the prohibitions and fetters, and it must be recorded, and the conditions embodied in the title. Of the necessity of specifying the lands there is an example in *King v. Earl of Stair*, 28th February 1844, affirmed 30th April 1846. Here, lands called *Cults* not being named, and no proof adduced that these lands had been possessed as part and pertinent of the lands which were named forty years before the date of the entail, this portion of the estate was held not to be entailed. The fetters also must be imposed by the entail itself, and it is not sufficient to refer to them as contained in another deed; *Gammell v. Cathcart, &c.*, 13th November 1849, affirmed on appeal, and previous authorities there cited. These decisions appear to be in opposition to the view held by the consulted Judges in *Hope Vere v. Hope & Others*, 5th March 1833. Nor is it sufficient that the titles refer to a registered entail for the conditions, if the foundation of the title is a deed posterior to the entail, and not registered; *Inglis v. Inglis*, 18th November 1851.

6 D. 821.
5 Bell's App.
82.

12 D. 19.
1 Macq. App.
862.
11 S. 520.

14 D. 54.

i. 226, 3^d Edⁿ.

In the Juridical Styles we have the terms of a strict entail in the

form of a disposition and deed of entail. We shall glance at such parts of this style as illustrate the peculiar nature and effect of the deed. In this form the entail constitutes a complete feudal conveyance of the estate, so as, when followed by infestment, to create a new investiture. Accordingly, it contains all the clauses of a disposition. In the dispositive clause the maker gives, grants, and disposes, the lands to himself, and the series of heirs he chooses to call, qualifying the absolute words of conveyance by a reference to the conditions and fetters afterwards inserted; and after the destination there is a reference to any supplementary nomination he may execute, — a course which we have already seen to be competent.

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FORM OF ENTAIL, CONT'D.

After the obligation to infest, and procuratory of resignation, in the latter of which the destination is directed to be repeated *verbatim*, certain conditions are inserted. These are quite arbitrary, and may be directed to any lawful object the entailer chooses. In the form we have referred to, the first condition is, that the heirs shall bear the name, arms, and designation of the family. This is a common condition, and, if expressed with sufficient stringency, is effectual to exclude from the succession any heir who does not choose to comply with it. The second condition here is, that the heir shall record the entail, and take infestment under it. The object of this is to bring the entail into force, since it is inoperative till recorded. The next condition is, that the heirs shall take and possess by virtue of the entail alone, and by no other title, which prevents the entail from being worked off by prescription under a title of ordinary succession, or otherwise. The fourth of these conditions is, to engross the prohibitions, &c. in the titles, which is prescribed by the Statute itself.

ARBITRARY
CONDITIONS IN
ENTAILS.

All these conditions are arbitrary or unnecessary, and none of them are essential to make the entail valid. The essential conditions come next in this style, under the head *limitations* and *restrictions*.

ESSENTIAL CON-
DITIONS OF
ENTAILS.

The first of these is against altering the order of succession, with an exception, which is superfluous, enabling any heir to exclude a substitute legally incapable. This the law would itself provide for.

1. PROHIBITION
AGAINST ALTER-
ING ORDER OF
SUCCESSION.

The second limitation is not to sell, or contract debt, combining two of the three indispensable prohibitions. Then we have exceptions from these limitations, including power to the heirs to make provision for their wives, husbands, and younger children.

2. PROHIBITION
AGAINST SELL-
ING; AND
3. AGAINST
CONTRACTING
DEBT.

The third limitation in the Style-book is against granting tacks beyond nineteen years, which we shall see is also unnecessary, and against cutting timber; and the fourth limitation is against suffering special adjudications, — an injunction implied in the validity of the entail.

Then we have the essential matter of the irritant and resolute clauses. In the style before us the resolute clause comes first, and declares, that, if an heir shall contravene, he shall lose his right to the estate, as if he were naturally dead, and the right shall devolve

RESOLUTIVE
CLAUSE.

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upon the next heir. This is the clause of which it is the direct office to prevent the lands from being affected by creditors, by dissolving the contravener's title or real right in the act of contravention.

IRRITANT
CLAUSE.

The clause of irritancy declares all debts and deeds made or granted in contravention to be null and void. This is directed against the granter's personal deed only, and does not affect creditors, because not directed against them or against the real right, to which they look. The sting of the resolute clause consists in its destroying the title, on the validity of which the creditors' right depends. There is here also a supplemental resolution of the contravener's title, which appears unnecessary.

OTHER CLAUSES
OF ENTAIL.

There follows a series of provisions, all directed with professional anxiety to contingencies for which the law would of itself sufficiently provide. It is, therefore, unnecessary to examine them.

p. 696.

We have next the assignation to the writs, the importance of which is shewn in the case of *Renton v. Anstruther*, already cited, where it enabled the heir first called to use an unexecuted procuratory to complete his title.

There is next an obligation upon the entailer and his heirs-at-law, executors, and successors, to relieve the entailed lands and the heirs of entail of payment of his debts, which lays the burden of such payment primarily upon his general representatives in heritage and moveables to the exemption of heirs of entail.

Then there is power reserved to the entailer to revoke, alter, sell, or burden, a dispensation with delivery, a special commission to procurators to make application to the Court for registration in the register of entails, an ordinary clause of registration, and a precept of sasine.

The style which we have surveyed is unnecessarily prolix ; and, if it were still necessary to prepare entails in the full form, it might be recommended to study simplicity and brevity. The provisions of the Statute are simple, and the clauses requisite to give them effect may be simply expressed. At the same time, it is very necessary to keep in view, while examining deeds of entail, that the Statute does not contain a form of the deed ; and some entails have failed of effect from adopting the phraseology of the Act, under the erroneous impression that such was the way most effectually to secure its objects. In particular it is quite obvious, that, while the statute requires a resolute clause, and substantially describes the effect of such a clause in opening the succession to the next heir, there is no form of words, or any approximation to such a form, in the Statute, which would make a valid resolute clause.

SOLEMNITIES OF
STRICT EN-
TAILS.

In order to make the entail valid, the statute requires certain observances, which, because thus required, are matter of solemnity and indispensable :—

(1.) The irritant and resolute clauses must be inserted in the titles.

(2.) They must be repeated in all the subsequent conveyances of the estate to any of the heirs of entail. PART III.

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These provisions are of indispensable observance. By the express provisions of the statute, while the omission imports a contravention against the party himself, it does not militate against creditors *bond fide* contracting with him, and the omission, therefore, opens the lands to their diligence. In *Mitchell v. Tarbutt*, 4th February 1809, no F. C. real right having been completed under an entail, (so as to put the fetters upon the record of sasines,) the heir was found entitled to pursue a judicial sale of the estate for payment of the entailor's debts.

(3.) The entail must be recorded in the register of entails. This is done judicially upon application to the Court of Session, which authorizes the registration. All the substitute heirs have an interest to get the entail recorded, and may apply to the Court for the purpose; but, in *Jessop*, 7th February 1822, it was held doubtful whether this right extended to one who was only called ultimately as an heir whatsoever, after the substitutes specially appointed. The principal deed of entail must be produced to the Court; *Spittal*, 3d August 1781; and, if it have previously been recorded in another register, the Court will grant warrant to have it produced, and inserted in the register of entails. The deed must be recorded entire; and, where part of the lands in an entail had been sold after it was made, the Court would not grant authority to omit the description of these lands in the record; *Moore*, 28th November 1821. REGISTRATION
OF ENTAIL.
1 S. 294.
M. 15,617.
1 S. 178.

The execution of an entail cannot, of course, relieve the estate of burdens imposed before its date. The heirs represent the entailor in his obligations, which form real burdens upon the entailed estate. So, a perpetual obligation to relieve of teinds in consideration of an annual payment having been granted by the entailor, the heirs of entail were held bound to implement it; *Wilson v. Agnew, &c.* 1st February 1831. EFFECT OF
COMPLETED EN-
TAIL, AS TO EN-
TAILOR'S DEBTS.
9 S. 357.

When an entail has been regularly made and completed according to the solemnities above described, its effect is to exempt the estate from being affected by debts contracted after the registration of the deed; *Ross v. Drummond*, 3d March 1841; affirmed 4th September 1844. Mr. Erskine is of opinion, that, even when the entail is gratuitous, the maker of it is restrained after registration from affecting it with debt. Mr. Sandford takes the opposite view, and there seems no express authority on the point. In *Agnew v. Stewart and Drew*, 31st July 1822, in part reversing *Stewart v. Agnew*, 2d June 1818, an entail made, not gratuitously, but in implement of an onerous obligation, was held not to protect the estate from debts due by the entailor at the date of the entail; and the lands were also held liable for debts contracted after the date of the entail, if made real by infestment or adjudication before infestment on the entail, but for none 3 D. 698;
3 Bell's App.
87.
Inst. iii. 8, 24.
p. 403.
1 S. App. 320.
F. C.

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It may be made a condition of the entail, that the heirs shall pay the entailer's debts; and this will make the estate liable for the amount. The interest of an entailer's debt not only forms a claim against the heir who should have paid it, and his representatives, but it, as well as the principal, affects the fee of the estate, and must be paid by the heir actually in possession; *Campbell v. Campbell*, 29th November 1815. An heir of entail who pays the entailer's debts is entitled to keep them up, and prevent extinction *confusions*. This is effected by taking the conveyance of them to a trustee; *Lawrie v. Donald and Jones*, 7th December 1830.

F. C.

HEIR MAY KEEP UP ENTAILER'S DEBTS.

9 S. 147.

CONDITIONS AS TO BEARING NAME AND ARMS, &c.

M. 15,559.

By a valid entail the heir in possession is effectually precluded from doing everything against which the conditions are lawfully directed. We have already adverted to the usual condition requiring the heirs to use a particular name and arms. This was enforced in *Fleeming v. Lord Elphinstone*, 19th January 1804, where there was this additional provision, that, in case the heir should succeed to the dignity of the peerage, he should be bound to denude in favour of the next heir. This provision (notwithstanding the rule of strict interpretation, which we shall afterwards examine) was held to exclude a peer from succeeding to the estate.

HEIR IS FIAR, SO FAR AS NOT FETTERED.

13 D. 575.

Under this limitation of complete subjection to the conditions of the entail, the heir in possession is fiar, and has the powers of a proprietor in fee-simple in every particular from which he is not restrained by the fetters. Of the general proposition that the heir is fiar, an illustration is presented in the case of *M'Leod v. M'Leod's Trustees*, 1st February 1851. By the Bankruptcy Act, creditors are required in claiming upon a sequestrated estate to abate from their claims the value of securities affecting the estate of the bankrupt. Here a claimant being creditor not only of the bankrupt heir in possession, but also of the entailer, and so entitled to affect the estate, was held bound to value and deduct the right to recover out of the fee of the entailed estate as a security *affecting the estate of the bankrupt*. From the doctrine that the heir in possession is fiar subject to the limitations imposed, it results, that the successive heirs represent their predecessors in every act affecting the entailed estate which does not infer an irritancy; *per* Lord COREHOUSE.

6 S. 98.

HEIR MAY CUT WOOD.

2 S. 775.

NOT BOUND TO KEEP UP MANSION-HOUSE. F. C.

By virtue of this power as fiar, the heir in possession is entitled to cut wood growing upon the estate, when ripe and fit for sale, although he is restrained from injuring the mansion-house by cutting the wood necessary for its comfort; *Mackenzie v. Mackenzie*, 6th March 1824; and, although he cannot sell the materials of the mansion-house, he is not obliged to preserve it, but may let it go to ruin; *Gordon v. Gordon*, 24th January 1811.

Again, the prohibition to contract debt, whereby in terms of the Act the lands “may be appraised, adjudged, or evicted from the other substitutes in the entail,” is restricted to contraction so made as actually to produce these effects, otherwise the heir would be debarred from making the most necessary purchases upon credit; and, so far as concerns his own interest, an heir of entail may contract debt and dispose the lands in security, provided the effect of such security is limited to the duration of his own life interest. This is effected by a declaration, that the security shall not affect the lands after the grantor’s death, and shall not be the ground of adjudication to the prejudice of the substitutes, and that the granting of the security shall not import a contravention. Of such a security effectually created we have an example in *Nairne v. Gray*, 15th February 1810. F. C. The life interest of the heir in possession may be adjudged for his debts, under the same condition that the right of the succeeding heirs shall not be infringed upon.

Under his powers as far also, the heir in possession may grant leases. But his power of leasing is limited to tacks of ordinary duration; and, if he shall grant a lease for a longer term than is requisite for the ordinary and necessary administration of the estate, that is reckoned an alienation, and falls under the prohibition to alienate; *Duke of Queensberry’s Executors v. Duke of Buccleuch*, 5th February 1818; reversed 2d July 1819. By this decision it is settled that the words *dispose* or *dispose of* have the same meaning as *alienate*, and are equally effectual to restrain long leases. It is also settled here, that the taking of a grassum is anticipated rent, and, as it reduces the rent below the just avail, it is a fraud upon the subsequent heirs, and reducible; nor can that result be avoided by taking a grassum upon one lease, then accepting a surrender, and granting a new lease at the same rent without a grassum. This case also settles that a lease for fifty-seven years is struck at by the prohibition to alienate. The rule extends to every portion of the entailed estate; and, in *Stirling v. Dunn*, 21st December 1827, affirmed 22d June 1829, a lease of a loch for 300 years was reduced as an alienation, that part of the estate being held subject to the fetters of the entail as well as any other part. The effect of the word *dispose* as co-extensive with *alienate* was here confirmed. The longest lease that has been sustained was for twenty-one years; *Wemyss v. Duke of Queensberry’s Executors*, 12th June 1822. A lease granted for an extraordinary period will be reduced at the suit of the next heir, although at the date of challenge there may be less time to run than the entail or common law permits; *Malcolm v. Bardner*, 19th June 1823. The principle, that the management must be fair towards the next heir excludes leases, not only of undue continuance, and granted for a present consideration injurious to the amount of the rent, but those

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HEIR MAY CONTRACT DEBT NOT AFFECTING THE LANDS BEYOND HIS LIFE INTEREST.

HEIR MAY GRANT LEASES OF ORDINARY DURATION.

F. C.

1 Bligh’s App. 339.

6 S. 272;

3 Wil. & Sh. App. 462.

1 S. 483.

2 S. 410.

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6 S. 69.

STATUTORY
POWER TO
LEASE.10 Geo. III.
c. 51.6 & 7 Will. IV.
c. 42, and 1 &
2 Vict. c. 70.BUILDING
LEASES.11 & 12 Vict.
c. 36, AS TO
LEASES.

17 D. 875.

also granted for less than the value obtainable; *Lord Elbank v. Hamilton*, 16th November 1827.

The power of leasing has been regulated by various Statutes. By the *Montgomery Act*, 10 Geo. III. cap. 51, the proprietor of an entailed estate may grant a tack for fourteen years after the ensuing Whitsunday, and for one existing life in addition, or for two lives and the survivor, or for any fixed number of years not exceeding thirty-one, the tenant being bound to enclose all the lands within the time specified by the Act, including not more than forty arable acres in one field, and, when the lease is for two lives or thirty-one years, the tenant being bound to keep and leave the fences in repair. By the *Rosebery Act*, 6 & 7 Will. IV. cap. 42, § 1, a tack for twenty-one years may be granted of lands, and for thirty-one years of mines and minerals, for a fair rent got either at public roup or by private bargain, although it may diminish the rental; but there is to be no grassum, or other consideration than the rent, under the pain of nullity, and the home-farm, mansion-house, and garden may not be let for any period beyond the heir's own life. The provisions of this Statute are, by 1 & 2 Vict. cap. 70, extended to heirs in possession under deeds of entail not recorded.* By the *Montgomery Act*, already referred to, 10 Geo. III. cap. 51, important provisions are contained in §§ 4-7 inclusive for granting building leases not exceeding ninety-nine years in duration, and limited to five acres to one person, with an irritancy unless a house of not less than ten pounds' value be erected within ten years, and kept in good repair, the rent being not less than in the last lease of the same ground; but the manor-place may not be leased, or any village built within 300 yards of it.

These powers the heir may exercise at his own pleasure, but, by the *Entail Amendment Act*, § 24, he may, after notice to the next heir, and with the approbation of the Court of Session, grant feus, or long leases of any part of the estate, except the mansion-house, offices, and policies, for the highest feu-duty or rent that can be got, the total extent of such feus and leases being limited not to exceed in all one-

* In *Muirhead v. Young*, 13th June 1855, an heir of entail in possession brought a reduction of a lease of minerals, under which operations of a very extensive character were being carried on. The reasons of reduction were, that the operations under the lease amounted to an alienation of the estate, and that the lease was, therefore, in contravention of the entail, and of the Act 6 & 7 Will. IV. c. 42. A proof having been allowed, it was held, (adopting a *dictum* of Lord ELDON in the *Tinwald* case,) that, to warrant a reduction, "there must be some unfairness, some fraud, or some gross culpable negligence, operating "as mischievously as fraud would operate"—that the proof here did not amount to this—that therefore, the lease was not a contravention of the entail or of the statute, but was, at the time it was entered into, a fair contract, under which the tenant took the risk of an unopened and untried field of minerals, which, at the date of the lease, had no practicable means of communication with markets. The reasons of reduction were, therefore, repelled.

eighth part of the estate in value ; and the acceptance of any grassum, fine, or consideration, is to import a nullity.*

The right of the heir as fiar appears also in his power at common law to settle upon his widow a jointure not exceeding the legal terce, unless expressly prohibited ; *Cant v. Borthwick*, 27th December 1726. The terce, however, may be effectually excluded by an express limitation of the power to provide widows ; *Cunninghame Fairlie v. Cunningham Fairlie*, 15th June 1819 ; and, when the terce is excluded, and power given to provide, the non-exercise of the power is no ground for the interposition of the Court, and the widow, therefore, has no claim to aliment ; *Campbell v. Campbell*, 16th December 1818. Since younger children have not, like the widow, any claim upon their parents' heritable estate, Mr. Erskine holds, although the case which he cites was reversed on appeal, that provisions made to younger children, when not authorized by the entail, import a contravention of the prohibitions to alienate and contract debt.

When power is given by the entail to make provision for widows and younger children, it is important to attend to the legal rules and effect of such provisions. If the authority given by the deed is general, and does not stipulate that such provisions shall be paid out of the rents or within a limited period, then the fee of the estate may be affected for payment. In *Duchess of Richmond v. Duke of Richmond*, 2d December 1837, the entail authorized reasonable and competent portions, and the Court held, that sums granted in the exercise of that power afforded the same recourse of diligence against the estate as an entailor's debt. When there is power to infest the widow in a certain sum or proportion of the rental, the value of the lands at the date of granting the annuity is the rule, and, therefore, the widow is entitled to what these lands shall yield, though it may eventually exceed the sum or proportion specified ; *Malcolm v. Malcolm*, 21st November 1823, and other authorities there cited. When a particular mode of fixing the amount is prescribed in the entail, as by reference, that mode must be observed ; *Earl of Rothes v. Countess of Rothes*, 21st January 1823. If a provision has been granted for a sum, exceeding either the amount or the proportion which the entail permits, the Court will not annul it entirely, but will restrict it to what is allowed ; *Campbells v. Campbell*, 6th February 1821. There is no restriction in the nature of the subject which may be appropriated under a general power to provide portions. In *The Duke of Roeburghe v. The Duchess Dowager*, 25th June 1818, under authority to grant competent portions and conjunct fees by marriage contract, the patronage of a church was held to be properly provided to a widow ; and, in *Douglas v. Douglas*, 15th May 1822, the rent of coal

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HEIR'S POWER
AS TO PROVI-
SIONS TO WIDOW
AND YOUNGER
CHILDREN.
M. 15,554.

PROVISIONS,
HOW CHARGE-
ABLE, AND HOW
ASCERTAINED.

16 S. 172.

2 S. 514.

2 S. 135.

F. C.

F. C.

* Additional privileges as to the granting of feus and long leases are conferred by 16 & 17 Vict. c. 94, § 6.

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F. C.

and lime was taken into computation to support the amount of provisions to a widow and children, these minerals being specified in the description of the subjects in the entail. It has also been settled, that the power to grant provisions is not, without a special limitation to that effect, restricted to one heir at a time, but may be competently vested in two heirs simultaneously. In *Craigie v. Craigie*, 4th December 1817, the fee was propelled by the heiress in possession, so as to vest the next heir during her life, and she reserved to herself power to provide for her own younger children. Provisions having, accordingly, been made by her, and a different set also by her son, the fiar, for his widow and younger children, both were held to be valid.

PROVISIONS
GIVING IMMEDIATE RIGHT OF
CREDIT.

1 S. 225.

It is sometimes of importance, that the provision to a younger child should form an immediate fund of credit, and, in *Oswald v. Oswald*, 20th December 1821, under a power to grant provisions bearing interest from the granter's death, it was held competent to grant a bond vesting a provision in a child so as to be transmissible by him or her during the granter's life. In the same case it was decided, that, when it is made incumbent upon the creditor in such a bond to recover payment within a limited time after the majority of the child, such obligation does not take effect at the child's majority, if the granter be then alive, but is suspended until his death. The heir who grants a vested provision to his child is bound to do whatever depends upon him, in order to render it effectual; and, therefore, where one had bound himself in his daughter's marriage contract to pay her a provision, he was held bound to liquidate a previous provision, the continued subsistence of which would have barred the daughter's claim against the succeeding heirs; *Sinclair v. Lord Duffus*, 22d January 1840. In *Dickson v. Dickson*, 4th February 1852, affirmed 13th June 1854, power was given by an entail to grant provisions to "younger children other than the heir." It had been decided in England that the term "younger children," in a settlement of this sort, means posterior in point of destination. The same was here laid down to be the rule in Scotland; and it was held, that an heir in possession, the heirs of whose body are not called to the succession, cannot burden the estate with a provision for his children under such a faculty. There can be no "younger children," where no child at all is entitled to succeed. The question was reserved as to the effect of a provision under the Aberdeen Act in such circumstances. In this case the Lord Justice-Clerk HOPK observed, that a general power to provide younger children enables an heir who has no son that will succeed to provide for daughters, and it also enables the heir to provide for daughters older than the son who will succeed. It may be noted, that, in the case of *Downtie v. Campbell*, 31st January 1815, there is a *dictum* of Lord MEADOWBANK to the effect that forfeiture by contravention does not vacate a provision previously granted by an heir of entail.

2 D. 356.

14 D. 432.

1 Macq. App.
729.

F. C.

When family provisions are entirely excluded by law or by the entail, or when those permitted are of small amount, a remedy is provided by the Statute 5 Geo. IV. cap. 87, commonly called the *Aberdeen Act*. But this remedy does not extend to entails made after 1st August 1848, being restricted by the Entail Amendment Act, § 12, to those of prior date. By the Aberdeen Act, an heir of entail in possession is allowed to infest his wife in an annuity not exceeding one-third of the free rent or value after deducting annual burdens, liferents, interest of debts, &c.; and an heir-female may infest her husband, the annuity in this case not exceeding one-half of the rent or value ascertained in the same manner, and restrictable to one-third, if the lands are burdened with a prior existing annuity. Only two liferents are allowed to subsist at once, but others may be granted to take effect prospectively. In estimating these annuities it has been fixed, that game rent falls to be taken into account as part of the rental; *Macpherson or Craigie v. Macpherson*, 16th February 1843, affirmed 13th August 1846. The rent of coal is also included, *Wellwood v. Wellwood*, 12th July 1848; and income-tax is not deducted; *MacLaine v. MacLaine*, 20th November 1845.

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FAMILY PRO-
VISIONS UNDER
ABERDEEN ACT,
5 GEO. IV. c. 87.

The heir in possession may also, by the Aberdeen Act, grant bonds of provision or obligations, binding the succeeding heirs of entail to pay to such of his children as shall not succeed to the estate, with interest from the granter's death, a sum not exceeding for one child one year's free rent after deducting annual payments—for two children, two years' rents—and for three or more, three years' rents. These provisions are available only to children alive at, or born after, the granter's death, with this exception that, where the obligation of the heir is granted in his child's marriage contract, it is effectual, although the child shall predecease him. In *Kennedy*, 11th July 1829, cited in 15 Dunlop's Reports, p. 197, it was decided, that provisions to his children by an heir-apparent, reasonable and suitable in amount, are binding on the subsequent heirs of entail who make up titles. One set of provisions only is permitted at once, but new ones may be granted, and only take effect as those of prior date are extinguished or diminished. The excess of a sum granted beyond the limit of the Act does not void the provision. The excess may be annulled by the Court of Session upon the application of a subsequent heir.* Provisions under this Act do not, like those made under an unqualified power in an entail, affect the fee of the lands, but only the rents or proceeds. They are made effectual by power to require payment of the heir one year after the granter's death, and to sue him, if payment is not made within three months, and to use all diligence except adjudication. The heir, however, is entitled to be discharged on assigning one-third of the rents to a trustee appointed by the Court; and this provision is further qualified by that

§ 8.
PROVISIONS UN-
DER ABERDEEN
ACT DO NOT
AFFECT THE
FEE OF THE
LANDS.
§§ 9, 10.

* See the case of *Dickson v. Dickson*, *supra*, p. 704.

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of § 13, that the heir shall not, by payments under this statute, and that of 10 Geo. III. authorizing improvements, be deprived of more than two-thirds of the free rent, the Court being empowered to authorize him to retain the excess beyond two-thirds from the security or provision least entitled to preference. It has been held, that, in construing this part of the statute, the rental is to be taken, according to the express direction in the case of widows, as it "may happen" to be at the death of the grantor;" and, where there was no rental available to the heir upon the death of his mother, the grantor of the provision, the whole rents being paid to the surviving husband as courtesy, the bond of provision was found to be ineffectual; *Maitland v. Maitland*, 22d December 1849.* This Statute does not abridge more extensive powers, where such are granted by the entail; and, on the other hand, it cannot be used to make provisions in addition to those permitted by the entail, so as to make the whole amount granted larger than is permitted by the Act.

12 D. 416.

FORMS OF BONDS
OF PROVISION
BY HEIRS OF
ENTAIL—
p. 456.
p. 454.

There are forms of bonds of provision by heirs of entail among the Juridical Styles. In the second volume there is the style of the bond to a wife in terms of an entail, and also the style of a bond to children, also in terms of an entail. There is a foot-note to the latter, directing that the grantor's power should be narrated, not from the entail, but from the investitures in his favour, for the alleged reason, that the powers in the investiture often vary from those in the entail. This, however, contemplates a laxity of practice totally inconsistent with the security of entail rights, and perfect regularity and accuracy should make it incumbent on the practitioner to refer both to the entail and the investiture, between which there should be no variance. It is unnecessary to go over the clauses. The bond will be founded upon a precise recital of the power in the entail. It binds the grantor and the heirs succeeding to him, as well as his heirs and successors generally, to make payment at his death, or at a term named after it. In order to throw the ultimate liability upon the heirs of entail, they are bound to relieve the other heirs. Clauses are also inserted, limiting the effect of the deed as regards diligence to conformity with the entail, and declaring that it shall be effectual only in so far as consistent with the terms and conditions of the entail. The styles contain a reserved power to alter, and dispensation with delivery. These, of course, will be omitted, when the provision is to vest immediately, as in the case of *Oswald*. These forms are properly inserted in the volume of the Juridical Styles relating to Moveable Rights, for the wife's provision does not necessarily require to be secured on the lands, unless that form of settle-

supra, p. 704.

* But, where the rents are directed to be accumulated for only one year from a certain date, the heir in possession during that time may grant a bond of provision, though actually in receipt of no proceeds, the Statute contemplating a continuous period during which there is no available rental; *Dickson v. Dickson*, 8th June 1855.

ment be prescribed, and the grantor cannot without special power burden the estate for children's provisions after his death. It was decided in *Crawford v. Hotchkiss*, 11th March 1809, that a power to provide children in two years' rents of the tailzied lands was effectually exercised by a bond obliging the grantor and the heirs of entail, although not directed against the lands. The second volume of the Style-book contains also precedents for bonds of provision to children under the Aberdeen Act, applicable to the various circumstances under which such deeds are likely to be required. pp. 458-463.

A very important addition has been made to the powers of granting provisions to younger children, by the Entail Amendment Act, which enables the heirs to charge them upon the fee of the estate. By § 21, an heir liable to assign the rents for a provision granted by a former heir, may charge the fee and rents of the estate or any portion of it, except the mansion-house and policies, by granting bond and disposition in security in ordinary form, binding the grantor and his heirs of entail in their order successively to pay the principal sum with interest and penalties.* And the same may be done by the grantor of the provision himself, where it has been made in the marriage contract of his younger child. The deed may contain all clauses usual in bonds and dispositions in security granted over estates in Scotland held in fee-simple. The provisions may thus be put into the available form of an heritable security with a personal obligation, giving the same recourse against the entailed lands which a creditor with such a security has against other lands, but with this qualification that, by § 22, the heirs in their order are bound annually to pay and keep down the interest, and, if this shall be neglected, the recourse of the creditor against the fee and rents of the land is limited to the principal and two years' interest with corresponding penalties. If more interest is allowed to fall into arrear, he must have recourse for that against those heirs of entail who were bound to have paid it, and against their representatives and separate estates. In order to obtain this security, application must be made to the Court of Session specifying the portion of the estate proposed to be charged. § 23. Tutors of heirs in pupilarity cannot grant bond and disposition for provisions; *Muirhead*, 12th July 1849. It is to be observed, also, that this enactment has in view such provisions only as continuously affect all the future rents. When the entail, therefore, limits the period during which the provisions shall affect the rents, the statute does not authorize the charging of these upon the fee; *Campbell*, 26th January 1854. 11 D. 1249. 16 D. 397.

The 29th section of the Entail Amendment Act authorizes the

* This bond and disposition in security may be granted in favour of any party advancing the amount of the provision to the younger child; 16 & 17 Vict. c. 94, § 7. All bonds and dispositions in security under the Entail Amendment Act, and under 16 & 17 Vict. c. 94 may, by § 23 of the latter Act, contain power of sale.

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F. C.
PROVISIONS TO
YOUNGER CHILDREN UNDER
ENTAIL AMENDMENT ACT.
NOW CHARGEABLE ON FEE.

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M. 2338.
1 D. 794.
5 Bell's App.
280.

F. C.

EXCEPTIONS
FROM PROHIBI-
TION TO SELL.

SALE OF LANDS
FOR GOVERN-
MENT PURPOSES;
AND SALE OF
SUPERIORITIES.

SALE FOR PAY-
MENT OF EN-
TAILER'S DEBTS.

POWERS OF
SALE UNDER
ENTAIL AMEND-
MENT ACT.

granting of provisions out of money or other property under trust for the purchase of land to be entailed, of the same amount as might be granted by the Aberdeen Act, if land were purchased and entailed. Legislative sanction is thus given to a principle previously fixed in the cases of *Houston v. Stewart Nicolson*, 28th January 1756, and *Macpherson v. Macpherson*, 24th May 1839, affirmed 13th August 1846.

With regard to the payment of provisions not required to be extinguished within a limited time, it was settled in a case already cited, *Crawford v. Hotchkis*, 11th March 1809, that an heir of entail paying such a bond may keep it up as a debt against subsequent heirs by taking an assignation to himself and his heirs, not of tailzie, but whomever. This prevents extinction *confusione*.

In reviewing the heir of entail's powers, notwithstanding the fetters, we have next to observe, that the prohibition to sell is subject to various statutory exceptions:—

By the 20 Geo. II. cap. 50, § 14, heirs of entail may sell lands, though strictly entailed, to the Crown, in order to erect buildings or make settlements; and by § 16 of the same Act, they may sell the superiorities included in the entail to the vassals. The latter was a power largely used for the creation of freehold qualifications before the Reform Bill. By the next Act of the same year, 20 Geo. II. cap. 51, tutors of heirs of entail are empowered to sell to the Crown, the price in both cases to be settled to the same uses and under the same restrictions as in the entail.

Sales may also be made for payment of entail's debts, affecting, or that may be made to affect, the fee of the estate, by 6 & 7 Will. IV. cap. 42, which, in sections 7 to 19 inclusive, contains the provisions and regulations under which such sales may be made. These, however, appear now to be practically superseded by the more comprehensive power contained in the Entail Amendment Act.

The 25th section of the latter statute gives the heir in possession power to sell in every case—(1.) in which he can charge the lands with debts by bond and disposition in security—(2.) where he is entitled by Act of Parliament to charge with debt, but not to sell—and (3.) in all cases in which the fee of the estate is validly charged with debt.* The Court of Session is to select the portion to be sold, and to approve of the price, and of the disposition in fee-simple to be granted by the heir. The purchaser is discharged of the price by paying it into Court, at whose sight it is to be applied in payment of the debt for which the sale was made, the surplus being applicable, if more than £200, in payment of other debts, redemption of land-tax, improvements, or repayment of improvements, or in purchasing other lands to be added to the entailed estate, the tailzie of which new lands, whatever be its actual date, being to be taken as of equal

* Additional powers of sale for payment of entail's debts are given by 16 & 17 Vict. c. 94, § 9.

date with the entail of the remainder. By § 30, creditors in deeds of security are restrained from selling in manifest excess of what is necessary to pay their claim, and, when there is a surplus, the creditor and purchaser are bound to apply to the Court, to have it deposited, and re-invested.

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By the Act 3 & 4 Vict. cap. 48, heirs of entail in possession are empowered to grant feus or leases of a limited portion of ground for an inadequate feu-duty or rent for the erection of churches, not exceeding a quarter of an acre for each—for burying-places, not exceeding an acre for one—for schools and play-grounds, not exceeding one acre in each case—and for dwelling-houses and gardens for ministers and schoolmasters, not exceeding one-eighth of an acre for each dwelling-house, and half-an-acre for one garden. Under this Act the Sheriff judges of the propriety of the feu or lease.

FEUS UNDER
3 & 4 Vict.
c. 48.

We have already seen, that by the 24th Section of the Entail Amendment Act the heir in possession may, after notice to the next heir, with the approval of the Court, feu one-eighth part of the estate, but under the pain of nullity, if a grassum or any other consideration except the feu-duty be taken.

supra, p. 702.

The powers of sale which we have hitherto noticed are such as the heir may, under the conditions prescribed in each case, exercise independently of any consent by the future heirs. By the 4th section of the Entail Amendment Act, an heir in possession may sell, charge, lease, and feu, with certain consents of the future heirs, viz, if both the heir in possession and the consenters were born before 1st August 1848, he must have the consent either of the three nearest heirs at the time, or of the two next heirs-apparent, i.e., heirs whose right of succession nothing but death can disappoint. If the heir-apparent was born after 1st August 1848, the alienation may be made with his consent alone; and, if the heir in possession himself was born after that date, he can disentail and possess in fee-simple.

POWERS TO
SELL, FEU, &c.,
WITH CONSENT
OF FUTURE
HEIRS.

Various Statutory powers have also been granted to entail proprietors to convey portions of the entailed lands in exchange for others desirable to be held along with the estate:—

STATUTORY
POWER OF EX-
CAMBION:—

By 10 Geo. III. cap. 51, (the *Montgomery Act*), § 32, liberty is given to excamb thirty acres arable, or one hundred incapable of culture, for an equivalent in lands contiguous to the entailed estate, the value being adjusted by the Sheriff upon the report of valuers upon oath. Upon the contract being recorded in the Sheriff-court books within three months it becomes effectual, and the entailed lands are thenceforth free from, while those acquired become subject to, the clauses prohibitory, irritant, and resolute.

10 Geo. III.
c. 51.

A material enlargement of this power was made by the *Rosebery Act*, 6 & 7 Will. IV. cap. 42, which extends the liberty of excambion to one-fourth of the estate, excepting the mansion-house, garden, and home-farm. It removes also every restriction upon the nature of

6 & 7 Will. IV.
c. 42.

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2 D. 1458.

11 & 12 Vict.
c. 36.

the entailed property which may be exchanged. In *Earl of Kinnoull*, 16th July 1840, the patronage of a church held under entail was found to be a fit subject for excambion.

The regulations contained in the third clause of the Rosebery Act regarding notices and the procedure before the Court of Session, are superseded by the 36th and 37th sections of the Entail Amendment Act, which provides, that the heirs to receive notice shall be the same in number as for disentailing, and that the procedure shall be by summary petition according to the forms prescribed in the later Statute. The necessity of recording the excambion in the Sheriff-court record is abolished, and registration in the register of entails declared sufficient.

25.

26.

1 & 2 Vict.
c. 70.

By the Rosebery Act, debts contracted between the execution of the contract of excambion, and the recording of it in the register of entails, are declared not to affect the lands acquired. The surplus of value not exceeding £200, is to be paid to the proprietor; and the excambion is declared null, if made upon any other consideration than the lands and such limited surplus value. For the purposes of this Act, two or more entails are to be held as one deed, if they all give the succession to the same series of heirs; and the Montgomery Act is continued in force in so far as not altered or repealed. The latter statute may, therefore, still be used for excambions of small portions.

The provisions of the Rosebery Act are extended by the Act 1 & 2 Vict. cap. 70, to heirs of entail in possession under deeds not recorded, in which case the contract is to be registered in the Sheriff-court only; but, if the entail shall be recorded after the excambion, the contract must enter the record of entails at the same time, otherwise the entail itself will be held as not recorded.

4 & 5 Vict.
c. 24.

The Act, 4 & 5 Vict. cap. 24, renders it unnecessary to insert in contracts of excambion the destination or conditions of the entail, provided these be referred to as contained in the deed of entail, and that it be described by its date and the date of recording it. By this statute, the keeper is bound to record contracts of excambion in the register of tailzies without a warrant.

The 5th section of the Entail Amendment Act empowers the heir in possession to excamb the whole estate with certain consents, and under the authority of the Court.*

RELAXATION
OF PROHIBITION
AGAINST CON-
TRACTING DEBT.

7 Bell's App.
82.

Having thus reviewed the heir's power of alienation notwithstanding the fetters, we proceed to inquire how far the prohibition to contract debt has been relaxed. Although the Statute refers to the contraction of debt in general terms, it is sufficient if the prohibition be directed against contracting debt upon the land; *Burden v. Burden*,

* In contracts of excambion, the destination, and clauses prohibitory, &c., of the original Entail may be omitted, provided they be referred to as set forth in the original tailzie; 16 & 17 Vict. c. 94, § 11.

25th March 1850. Having already seen how, and to what extent, the fee may be affected by family provisions, it is only necessary here to refer to the statutory permission to contract debt for money expended in improving the estate. This was granted by the Montgomery Act, 10 Geo. III. cap. 51, which enables an heir of entail to be the creditor of succeeding heirs for three-fourth parts of such monies as he shall, under the provisions of that Act, expend upon improvements in enclosing, planting, draining, and erecting farm-houses, and offices, and out-buildings for the same. To these there has been added, by the 20th section of the Entail Amendment Act, the formation of private roads through the entailed estate, or for immediate access to it.

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CONTRACTION
OF DEBT FOR
IMPROVEMENTS.
10 Geo. III.
c. 51.

11 & 12 Vict.
c. 36.

Among the reports of decisions various points are settled. An embankment to secure an outfall for drainage is an accessory of draining allowed by the Montgomery Act, and so chargeable against future heirs; *Baillie*, 17th July 1850. An engine to work minerals is a facility to exhaust the substance of the estate, and not so chargeable; *Earl of Glasgow*, 27th November 1850. The expense of a bridge to connect the mansion-house with the garden was sustained; also a pond and loch for drainage; *Porterfield*, 24th February 1853. Again, introducing water into the mansion-house—erecting a porter's lodge, and gates—filling up an exhausted quarry—and executing works to prevent the recurrence of a landslip—these were all held permanent improvements in terms of the Statutes; but furnishing a mill with mill-stones was not admitted; *Muirhead*, 10th March 1853. The cost of a tile-work claimed as part of the expense of drainage was not allowed in *Marquis of Ailsa*, 20th January 1853.*

13 D. 42.

13 D. 187.

15 D. 423.

15 D. 517.

15 D. 308.

The *maximum* amount for which an heir may become creditor on account of improvement expenditure is declared by the 10th clause of the Act to be four years' free rent as at the Whitsunday after his death.

The Montgomery Act contains very particular provisions for giving notice to future heirs, and for the registration of annual accounts and vouchers in the Sheriff-court; and it empowered the executor or assignee having right to the claim to obtain decree against the next heir after his succession, and to use every kind of diligence except adjudication, the decree for improvements being declared a preferable claim in all competitions for the rent among the creditors of the succeeding heir. He is entitled, however, to be discharged, on assigning one-third of the clear rents during his life or till payment. There

NOTICES TO
FUTURE HEIRS
UNDER MONT-
GOMERY ACT.

* The expense of trenching, previous to draining, is not an improvement within the meaning of the Montgomery Act; *Ramsay*, 21st November 1854. Expenditure on private roads, however, was here allowed. A thirlage mill does not fall under the statutory provision as to improvements on farm-house, offices, and out-buildings; *Fleming*, 17th February 1855. Shooting-lodges are not improvements within the Montgomery Act; *Duke of Athole*, 8d July 1855. Again, repairs on an inn—expense of new smithy—shed for game—dog's couch—repairing a house at a saw-mill—a smith's house—embankments—road to a tile-work—and erecting a tile-work—were disallowed; *Duke of Athole*, 4th March 1856.

17 D. 74.

17 D. 451.

17 D. 1015.

18 D. 730.

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are provisions for imposing a similar liability upon the subsequent heirs in their order, each for one-third of the rents accruing to him, with mutual relief for any excess of payments beyond the proportion of each. But the creditor is bound to proceed within two years after the death of the expending proprietor, and to do diligence under the penalty of losing recourse against the rents. The claim is extinguished if the next heir of entail obtains right to it.

§§ 27, *et seq.*

The same Statute enables the heir who shall build a mansion-house to become creditor of the succeeding heirs for three-fourths of the cost, by similar procedure, and with the same powers of recovery, liability, and relief, as in the case of other improvements.

pp. 421 424.

By section 26, the expending heir may get the debt judicially ascertained by the Court of Session or Sheriff, the decree being final, if not suspended in six, or appealed in twelve, months. When money is to be expended in terms of this Statute, with the view of founding a claim on creditors for three-fourths of the amount, it is indispensable that the practitioner make himself thoroughly acquainted with its provisions. Very exact observance of them is required by the Court, as will be found on referring to the cases in Shaw's Digest, *voce* **ENTAIL MELIORATIONS**; and in some respects it is difficult to accomplish a minute compliance, as, for instance, to bring within each year the payment of all the expenditure executed in the same year according to the decision in *Marquis of Abercorn v. Hamilton*, 11th July 1840.

2 D. 1382.

14 S. 89.

The subscription of a factor and commissioner to the notice to the next heir was allowed in *Fraser v. Fraser*, 2d December 1835; but that decision was doubted, and the signature of a law-agent disallowed, in *Fraser v. Lord Lovat*, 27th February 1840, affirmed 28th February 1842.

2 D. 684.
1 Bell's App.
105.

We have noticed these points, because the 14th section of the recent Statute clearly contemplates that the Rosebery Act shall continue to be acted upon, and, although a subsequent clause provides a remedy for the neglect or imperfect observance of the previous Act, it would appear to be the duty of the practitioner generally to proceed according to its provisions.

HEIR MAY
GRANT BOND OF
ANNUAL-RENT
FOR IMPROVE-
MENT MONEY.

The decree for improvement money, on account of the mode of its recovery, and the contingencies which might affect it, has not hitherto been regarded with favour as a security. An effort has been made to improve it by section 13 of the Entail Amendment Act, which empowers an heir who has obtained a decree for improvement money to grant, with the authority of the Court, a bond of annual-rent in ordinary form over the estate or any portion of it, binding himself and the heirs of tailzie to pay annual-rent, not exceeding legal interest of the three-fourths during his own life, and, for the twenty-five years after his decease, not exceeding £7, 2s. per cent. When the expenditure is made after the date of the recent Statute, the heir, having first obtained decree in terms of the Montgomery Act, may grant

bond of annual-rent, with the authority of the Court, for twenty-five years ; but, in this case, the amount is to be reckoned, not upon the three-fourths, but upon the whole sums expended. By § 15, the executor or assignee of improvement money expended by a former heir may apply to the Court to ordain the heir in possession to grant a bond of annual-rent for twenty-five years, calculated upon the three-fourths ; and § 16 enables the Court, upon the application of an heir who has expended money for improvements without adopting or complying with the provisions of the Act, to inquire and grant warrant for executing a bond of annual-rent, in the same way as if a decree had been obtained. The annual-rent is recoverable only from the § 17. rents and profits, and, if the creditor allows more than two years' annual-rent to fall in arrear, his recourse against the rents is lost, and restricted to the personal liability and separate means of the heir who should have paid. Instead of a bond of annual-rent, the succeeding § 18. heir may be called upon to grant a bond and disposition in security, charging the fee and rents (other than the mansion-house, &c.) for *two-thirds* of the amount upon which the annual-rent, if granted, would be calculated ; and this security is in its form, effect, and operation, to be the same as in the case of the like security granted for provisions to younger children. The granting of the bond of annual- § 19. rent, or bond and disposition in security, is a discharge of all claim for the improvements upon payment of the sums contained in these securities.

It is carefully to be noted, that the heir possessing under an entail not recorded has no right to recover any portion of money expended for improvements under the Montgomery Act, or consequently under the recent Statute ; *Paget v. Earl of Galloway*, 24th February 1837 ; 15 S. 667. *Lord Macdonald v. Macdonald*, 26th May 1840, affirmed 11th August 2 D. 889. 1842. This is founded upon the title and contents of the Act, which 1 Bell's App. refers only to strict entails, and upon the consideration that the pro- 819. prietor under an entail not recorded can borrow upon the security of the lands, and so needs no statutory power to do so.

*Strict interpretation of Entails.**—We have thus seen, how rigid is the effect of a perfect entail in tying up the hands of the successive proprietors, so that it is only in so far as the fetters are struck off by the force of Statute, that they can exercise the ordinary powers of alienating and contracting debt. But it is only a perfect entail that has this effect ; and, in proportion to the rigour with which the restraints are enforced, in the same proportion is the law jealous and inflexible in requiring that the deed shall be clear and unambiguous in prescribing the restraints in a complete and effectual form. By the ordinary rules of law, the heir is the unlimited fiar, and has com-

COURT WILL
NOT SUPPLY
OMISSIONS.

* Reference may be made to Mr. DUNCAN'S Digest of Entail Cases.

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STRICT INTER-
PRETATION OF
ENTAILS, *contd.*

No *voces sig-*
natae REQUIRED.

plete dominion over his property, and no limitation of his freedom is admitted by implication or presumed intention ; and, if a clause, or a word, or a syllable, or a letter, be wanting in the deed, although it be manifestly omitted *per incuriam*, the Court will not interpose to supply it. The fetters must be entire in every link, and, if there be any flaw, the law will lend no aid to repair it. But there are no *voces signatae* the use of which is indispensable. This only is requisite, that there shall be a clear substantive prohibition of each of the acts of selling, contracting debt, and altering the order of succession, each prohibition being independent, and striking directly at its own act, and not left to be extracted by inference from a construction of either of the other prohibitions ; and all the prohibitions must, either by general terms which unavoidably comprehend them all, or by distinct enumeration, be affected by the irritant and resolute clauses. While the rule of interpretation is strict, it is also fair ; and, if the act be truly prohibited in intelligible terms, the entail will receive effect. These rules and the principles which regulate their application will be seen, if we attend to the mode in which the different forms of stating the prohibition have been treated ; and this subject, as well as the whole of the remarks which shall be submitted in the sequel with regard to the rule of strict interpretation, have received an increased importance from the provisions of the recent Statute, which, contrary to the previous rule enforcing such of the fetters as were entire, notwithstanding defects in others, has now established by its 43d clause, that an entail defective in one of the prohibitions shall be invalid and ineffectual as regards them all.

We shall examine the effects given to the different modes of expressing the different clauses, and afterwards the consequences of omissions, defects, and errors.

REQUISITES OF
THIS CLAUSE.

(1.) *Prohibition against altering the order of succession.*—The rule that a prohibition can only be effectually made by distinct substantive terms was apparently departed from in a case, in which the alteration of the order of succession was not otherwise prohibited than by forbidding to do any deed whereby the estate might be adjudged or evicted “from the succeeding members, or their hopes of succession thereto in any measure evaded.” Here, it will be observed, altering the succession is not forbidden by a distinct and independent proposition, but only as a consequential result of deeds whereby the estate might be adjudged or evicted from the heirs of entail. Nevertheless, the Court of Session sustained it as effectual to prevent alteration of the order of succession. This was the case of the entail of Lochbuy ; *Maclaine v. Maclaine*, 23d June 1807. This decision, however, soon became the subject of doubt, and a clause of similar import was found to be ineffectual in the case of *Brown v. Countess of Dalhousie*, 25th May 1808. And the authority of the Lochbuy case was

M. *voces*
“Tailzie,”
App^r. No. 14.
M. *voces*
“Tailzie,”
App^r. No. 19.

distinctly impugned in the House of Lords in deciding *Lang v. Lang*, 16th June 1839, reversing the judgment of the Court of Session, 23d November 1838. Here, there was no separate prohibition, but, after prohibiting to sell or to contract debt, the clause proceeded, "or do any other deed whereby the said lands and subjects may be adjudged or evicted from the succeeding members of tailzie, or their hopes of succession thereto in any manner evaded." It was held, that a prohibition to alter the order of succession could only be raised here by inference, and that, therefore, there was no such prohibition.

The rule is thus distinctly stated by Lord COREHOUSE in *Gilmour v. Gilmour*, 16 S. 1261.

Cadell, 5th July 1838 :—"An entail must contain a substantive prohibition against alienation, a substantive prohibition against contracting debt, and a substantive prohibition against altering the order of succession. There is no set form of words in which these three prohibitions require to be expressed, nor is a separate and distinct clause of any given style necessary for each several prohibition. But the three substantive prohibitions must be all there, and all of them expressed. Nothing is more definitively settled by decisions than that doctrine." The case of *Grant v. Tytler*, 9th March 1826, is an example in a different form of an ineffectual attempt to supply a prohibition against altering the order of succession, by extracting it inferentially from other clauses. Where the order of succession has been validly altered by the heir in possession, the next heir cannot repudiate the alteration, and hold under the original (and defective) entail, so as to entitle himself to alter; *Oliphant v. Oliphant's Trustees*, 19th June 1851.

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Macl. & Rob.
App. 871.
1 D. 98.

THERE MUST BE
SUBSTANTIVE
PROHIBITIONS
AGAINST ALTER-
ING ORDER OF
SUCCESSION, &c.

4 S. 541.

13 D. 1174.

(2.) *Prohibition against selling*.—It is not indispensable, that the word *sell* be used, although it is specified in the Statute; and a prohibition to sell is not an effectual prohibition against alienation, because alienation may be made otherwise than by sale; *Russell v. Russell*, 7th December 1852. In *Creditors of Hepburn of Humble v. His Children*, 8th February 1758, affirmed on appeal, a prohibition to alienate or dispose was held to import a prohibition to sell. When power is granted by the entail to alienate by feuing, that power is construed with reference to the granter's purpose in permitting feus, and it cannot be used as an instrument to alienate the estate by feuing the whole, or to alter the order of succession by placing the lands under a new investiture by a feu grant, and then executing another entail; *Duke of Roxburghe v. Bellenden Ker*, 17th June 1813; affirmed 18th December 1813.

REQUISITES OF
THIS CLAUSE.

15 D. 192.

M. 15,507.

F. C.
2 Dow's App.
149.

(3.) *Prohibition against contracting debt*.—Here also, it is not indispensable to use the words of the Statute. Although it specifies the contraction of debt, the entail is held always to have the estate in view; and that prohibition is necessarily construed to mean such

REQUISITES OF
THIS CLAUSE.

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F. C.
2 S. 381.

2 S. 381.

contraction of debt as shall affect the lands. It is, therefore, sufficient, if the members are prohibited from burdening the estate with debt whereby the lands may be affected, appraised, adjudged, &c.; *Haggart & Sons v. Agnew*, 19th December 1820; *Nisbet v. Moncrieffe*, 10th June 1823. On the other hand, the prohibition is sufficient, if directed merely against contracting debt, without referring expressly to debts affecting the estate; and so a prohibition "to contract debt thereon" was held sufficient to prevent the lands being attached by diligence for the personal debts of the heir; *Mackenzie v. Mackenzie*, 23d May 1823.

8 S. 497.
5 Wil. & Sh.
App. 315.

Before the Entail Amendment Act, a defect in this prohibition could not be used indirectly to alter the order of succession; and, although such a defect is now destructive of the entail in every respect, we may, notwithstanding, refer with advantage to the case of *Cathcart v. Cathcart*, 12th February 1830; affirmed 18th July 1831. Here, the prohibition to contract debt being defective, the heir in possession gave his bill for £150,000 to a friend, who exchanged for it his own acceptance for the same amount. The heir allowed his bill to be protested, and the estate adjudged for the debt, after which he received a conveyance of the adjudication for a price of £95,000. But the Court held, that there was here no true debt, and that the whole transaction, being simulate and collusive, could not be sustained. Such a device would no longer serve any purpose in this matter, even if successful, but the decision is instructive to the Conveyancer in illustrating the futility of attempting to accomplish by mere mock transactions purposes which the law will only permit where the consideration is real and true.

REQUISITES OF
IRRITANT
CLAUSE.

4 S. 467;
3 Wil. & Sh.
App. 341.
12 D. 1.
7 Bell's App.
132.

6 D. 1320.

(4.) *The Irritant Clause*.—This is sufficient, if deeds granted, or things done, contrary to all or each of the prohibitions be declared null and void. Acts of contravention are often declared to be of no avail, force, strength, or effect; and these terms are equivalent to the simple declaration of nullity. It has been held sufficient to declare debts and deeds in contravention null in so far as they affect the other heirs or the estate, although they be not declared null as against the contravener; *Munro v. Munro*, 15th February 1826; affirmed 25th July 1828. But it has now been decided in *Lord Wharnccliffe v. Nairne*, 13th November 1849, affirmed 5th July 1850, that an irritant clause was ineffectual to prevent a sale, because not declaring the things prohibited absolutely null, but only in so far as they might infer action against the next heir or the lands. There must thus be a distinct and sufficient irritancy of the acts prohibited,* and the rigour with which this is required is shewn by the case of *Martin v. Dunbar*, 17th July 1844. Here, the prohibition was against contracting debts, or giving

* See case of *Laurie v. Laurie*, *infra*, p. 718, note.

bond or obligation ; and the irritant clause bore, that, in case of contra-
vention by contracting debts, the said bonds and obligations made in
the contrary should be null and void. It was held, that the estate was
not protected even from debts constituted by bond and obligation, be-
cause the irritancy was directed, not against the contracting of debt,
but against these instruments merely, and a debt contracted by bond
or obligation might be effectually constituted in some other way. The
same rule is, in another form, very remarkably illustrated in another
case, where, by a clerical error, the nominative in the irritant clause
was omitted. Lord COREHOUSE, Ordinary, held it competent to restore
the syntax, defective by a clerical error, by means of reference to the
context ; and the Inner-House adopted his view. But in the House
of Lords the omission was held fatal, for, as the deed stood, nothing
was declared null ; and the rule of strict interpretation excludes con-
jectural construction ; *Sharpe of Hoddam v. Sharpe*, 3d July 1832 ;
reversed 18th April 1835. Lord BROUGHAM's judgment in this case
is deservedly admired as a masterpiece of legal criticism. Notwith-
standing this decision, however, an omission is not fatal, where the
context sufficiently makes out what necessarily must be the sense.
So, where, after naming the institute, the fetters were directed against
any of the other of tailzie foresaid, (the word *heirs* being omitted,)
the defect was held not to be fatal, the meaning being plain, even
holding nothing to have been omitted ; *Holmes and Campbell v. Cun-*
ingham, 13th February 1851. 10 S. 747 ;
1 Sh. & MacL.
App. 594. 13 D. 689.

The want of an irritant clause is irreparable. It is not supplied
by the existence of a resolutive clause, for that has a separate pur-
pose ; nor can an irritancy be raised by construction out of a prohibi-
tion ; *Kempt v. Watt*, 28th January 1779 ; *Barclay v. Adam*, 18th M. 15,528.
May 1821. Nor will an irritancy cover anything to which it is not
applied by comprehension or distinct reference. In *Dick v. Dick*, 14th F. C.
January 1812, a tack granted for the extraordinary period of thirty-
one years was supported, because the irritancy was not so expressed
as to refer to the granting of tacks, which were contained in an enu-
meration of things prohibited, but not contained in a similar enumera-
tion in the irritant clause. In *Dick's* case the rule was laid down,
that, when a word of flexible meaning is used in one part of an entail
in a fixed and limited sense, and occurs afterwards in a doubtful
sense, it is to be interpreted in a meaning not more extensive than
where it is first used. This rule was held as sound in *Lang v. Lang*,
16th August 1839. The expression "deeds to be made and granted,"
occurring in the irritant clause, was held to apply to written deeds
only, and the clause, therefore, defective as not applying to debts con-
tracted otherwise than by writing ; *Hay v. Hay*, 11th March 1851. 13 D. 945.
But anterior to the Entail Amendment Act a defect in directing the
irritancy against one prohibition could not be made available to give
effect to an act opposed to a prohibition effectually fenced. So, where

IRRITANT
CLAUSE
ABSOLUTELY
NECESSARY.

1 Sh. App. 24.

MacL. & Rob.
App. 871.

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11 D. 908;
7 Bell's App.
65.

REQUISITES
AND EFFECT OF
RESOLUTIVE
CLAUSE.

sales were not covered by the irritancy, a creditor could not adjudge so as to sell, his debt being struck at by an effectual prohibition; *Bogle & Co. v. Cochrane*, 25th March 1850.

(5.) *The Resolutive Clause*.—This clause must necessarily declare the forfeiture of the contravener's right by his contravention. It is by this, as we have seen, that creditors are reached. Prohibitions and irritancies are personal. Resolution affects the real right. By the force of the resolutive clause, and of the decree of forfeiture following upon it, the right of the contravener is forfeited in the act of contravention. His title thus ceasing, his creditors cannot take the lands, for no act of his can burden what is not his own. The want of a resolutive clause, therefore, leaves the lands open to be affected by the debts of the heir in possession, and they can be attached by adjudication; *Creditors of Hepburn of Humble v. His Children*, 8th February 1758. This follows, however strong the prohibitions, and although there be a complete irritant clause; *Bruce v. Bruce*, 17th January 1799, affirmed on appeal. The same was held irreversibly fixed in *Mitchelson v. Atkinson*, 15th June 1831, where, there being no resolutive clause, an heir succeeding was held to incur representation to his predecessor and liability for his debts. When there is no resolutive clause, the future heirs cannot prevent a sale by inhibition, because, although that diligence secures a right, it cannot supply defects in it; *Lord Ankerville v. Saunders*, 8th August 1787.

This clause is necessarily subject to the same strict rules of criticism as other parts of the deed. If the whole prohibited acts are not here embraced in a phrase undoubtedly sufficient to comprehend them all, they must be enumerated with precise accuracy. Therefore, in *Menzies v. Menzies*, 18th February 1852, an entail was held entirely defective, (in terms of § 43 of the Entail Amendment Act,) in consequence of sales being omitted in the resolutive clause. In the case of *Stobbs* the prohibition was to "sell, annailzie, wadset, dispone, "dilapidate." In reference to this the resolutive clause bore "dispone" only. That was held effectual against sale; *Elliot v. Heirs of Entail of Stobbs*, 15th May 1803; and effectual also against a long lease, *Elliot v. Potts*, 14th May 1821.*

CONSEQUENCE
OF DEFECTIVE
ENTAILS BEFORE
AMENDMENT
ACT.

Before the Entail Amendment Act, the want of particular clauses, or defects in them, were confined in their effects to the particular things with respect to which the failure occurred. If there was no clause against selling, the heir could sell notwithstanding a valid

17 D. 181.

* In the case of *Laurie v. Laurie*, 13th December 1854, the entail contained prohibitions against alterations of the order of succession, sale, contraction of debt, feudal delinquencies, and treason. The irritant clause struck at acts of contravention, in so far as they might affect, burden, evict, or forfeit the lands. It was held, that here the word *affect* was sufficient to express the operation of all the prohibited acts against the estate.

prohibition to contract debt sufficiently fenced; *Sinclair v. Sinclairs*, 8th November 1749, affirmed on appeal; and a prohibition against altering the order of succession with irritant and resolute clauses was no bar to the contraction of, and burdening the lands with, debt, or selling for onerous causes, if these acts were not prohibited; *Campbell's Heirs v. Wightman's Representatives*, 17th June 1746; nor could such defects be supplied by the heir in possession, for he was bound to possess and to transmit under the same conditions upon which he acquired. Accordingly, in *Meldrum v. Maitland*, 29th June 1827, an heir possessing under an imperfect entail was found not entitled to make a new one imposing additional restrictions.

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M. 15,382.

M. 15,505.

5 S. 857.

These cases have been cited with a view, as well to an historical acquaintance with the law, as in order to shew distinctly the occasion and the force of the provision contained in the forty-third section of the recent Entail Amendment Act, which enacts, that, when an entail is invalid in any one of the three leading prohibitions through defects either of the original entail or of the investiture, then it is invalid and ineffectual as regards all of these prohibitions, and the estate is subject to the deeds and debts of the heir in possession, without any action of forfeiture to the heirs-substitutes upon the ground of his thereby contravening the conditions. This clause, it has now been decided, is not retrospective, so that the total invalidity is not from the date of the defective entail, but from the date of the statute; *Urquhart v. Urquhart*, 20th February 1851.* The forty-third section is effectual in annulling a defective entail without declarator; and, in *Russell v. Russell*, 7th December 1852, payment of provisions was enforced, on the ground that, the granter having survived the passing of the Act, the entail, being defective in one provision, was null in his person.

NOW, DEFECT
IN ONE PROHI-
BITION INVAL-
DATES ALL.

13 D. 742.

15 D. 192.

In considering the rule of strict interpretation, our attention is not to be confined to particular clauses. We must look to the general structure of the deed, and observe how the clauses stand together, and mutually refer to, and support, each other by a general mutual connexion, or by an adequate specification, when that method is adopted. The importance of this is shewn by various decisions. In *Speid v. Speid*, 21st February 1837, after prohibitions to alter the order of succession, sell, and contract debt, it was declared, that, if the persons succeeding should do in the contrary of the provision above set forth, the act should be null. This was held an ineffectual irritancy, the word *provision* in the singular not including the whole acts, and not being applicable with certainty to any one. With this case we ought to contrast that of *Preston v. Heirs of Entail of Val-*

STRICT INTER-
PRETATION IN
REFERENCE TO
GENERAL STRUC-
TURE OF EN-
TAIL.

15 S. 618.

7 D. 305.

* *Scott v. Scott*, 6th December 1855. This case also decided in conformity with previous cases, that an entail, which does not contain an irritancy applicable to the prohibition to alter the order of succession, is invalid in terms of the Entail Amendment Act.

18 D. 168.

PART III. *leyfield*, 28th January 1845, where the word *provision* was also used

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8 D. 136.

2 Bell's App.
104.

8 D. 636.

M'L. & Rob.
App. 871.

15 D. 587.

DEFECTIVE RE-
CAPITULATION.
8 Sh. & M'L.
App. 142.
15 S. 372.

15 D. 252.

2 Macq. App.
260.

18 D. 249.

in introducing the irritant clause; but here it was held to be sufficient, because the whole prohibitions were contained in one clause beginning with the word *providing*, and, therefore, the term *provision* was held to embrace the whole prohibitions. The necessity of considering the context and position of words in determining the effect of expressions is shewn by other cases, in which the same terms have suffered the most important modifications on account of the relation in which they were used. Thus, in *Lumsden v. Lumsden*, 26th November 1840, affirmed 18th August 1843, the irritant clause consisted of a declaration, that all debts and deeds in contravention of the entail should be null and void; and these words being so placed as necessarily to refer to the whole prohibitions, the irritancy was found effectual to prevent sales. On the other hand, in *Sinclair v. Sinclairs*, 26th February 1841, the same words, *debts and deeds*, were used in the irritant clause, but in immediate connexion with the last member of the prohibitory clause, where the same words were also employed to express those acts only, on account of which the estate could be adjudged by creditors. The clause, therefore, was held not to be an effectual irritancy of sales. The same had previously been decided in the court of last resort in the case of *Lang v. Lang*, already cited.* The construction is sometimes attended with much nicety, as in *Gilmour v. Gordon*, 24th March 1853, where the words *facts and deeds* were held to refer to the whole prohibitions, being connected by the relative "such," not, as argued, with the last member of the prohibitory clause, but with the verbs "*act or do*" in the irritant clause. The case should be compared with that of *Lang*, where the same words were held insufficient. †

A frequent flaw consists of defective recapitulation. In *Rennie v. Horne*, 13th March 1838, reversing *Horne v. Rennie*, 17th January 1837, there was a prohibition of sales, and a general declaration of irritancy of all acts of contravention, but the general irritancy was followed by an enumeration of particular acts declared to be void, and in this enumeration sales were omitted. It was held, therefore, that there was no effectual prohibition of sales. ‡

* The decision in the cases of *Sinclair* and *Lang* was followed in the case of *Earl of Airlie v. Ogilvy*, 16th December 1852, affirmed 27th March 1855, where it was held that the term *deeds* in the irritant clause referred only to deeds prohibited in the last part of the prohibitory clause, and that the previous prohibitions were, therefore, insufficiently fenced.

† An entail contained this irritancy, "that not only my said lands and estate shall not be burdened with or liable to the *debts or deeds*, crimes or acts, of the heir of entail so coming, but also all *deeds or acts*, contracted, granted, done, or committed," &c., shall be absolutely void and null. It was held, that the word *deeds* in the latter part of the clause was not limited by the use of it in the previous part, so as to exclude *debts*; and that the general expression, *deeds or acts* operated as a good irritancy applicable to the prohibition against the contraction of debt; *Mackintosh v. Mackintosh*, 14th December 1855.

‡ An entail, which had the three prohibitions against alteration of the succession, sales, and contraction of debt, contained this irritancy—that, if any of the heirs "should do anything

In order, however, to give effect to the objection of defective enumeration, it must be clear, that the entailer had the purpose to enumerate; and, where particular acts were set forth alternatively after a general and comprehensive reference, that was held not to import the design to enumerate, the generality remaining unimpaired; *Burden v. Burden*, 25th March 1850.

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8 D. 190;
7 Bell's App.
32.

The rule of strict interpretation not only requires that there be a perfect attachment of the irritant and resolute clauses to the prohibitions, but also that the fetters shall be effectually fixed upon the whole members of entail. A failure in this has repeatedly been the means of defeating the entailer's design. The person first called is generally stated, not as an heir, but as a donee, and he takes the succession, not by service, but by infeftment as a singular successor by virtue of the procuratory or precept in his favour. He is not, therefore, an heir, and, if the clauses, prohibitory, irritant, and resolute, impose the fetters upon the heirs, they do not apply to him. This was settled in the Duntreath Case, *Edmonstone v. Edmonstone*, 24th November 1769. Here, the lands were disposed by the entail to A., and the heirs-male of his body, whom failing, to B., and the heirs male of his body, &c., and the prohibitions were directed against "the heirs of tailzie and provision above named." Upon the death of the entailer, A., the institute, raised an action of declarator against the heirs called after him, to have it found, that, as donee and complete fiar, he was not subject to any of the prohibitions. The Court of Session, influenced by the occurrence in the deed (but not in the prohibition) of such expressions as "the said A. and the other heirs of entail," held, that he was subject to the limitations. But the House of Lords reversed the judgment, and declared, that A., being fiar or donee, and not an heir of tailzie, ought not, by implication from other parts of the deed, to be construed within the prohibitory, irritant, and resolute clauses, these being laid only upon the heirs of tailzie. The same was decided in *Menzies v. Menzies*, 18th January 1803, where one, though named heir of tailzie in the beginning of the deed, being appointed donee or institute by the latter part, was held not to be comprehended in the fetters, which were imposed upon the heirs of tailzie only. This case was affirmed on appeal, 20th July 1811. The principle has been followed in numerous cases, and *inter alios* in *Campbell v. Marquis of Breadalbane*, 23d November 1838, affirmed 1st April 1841. The institute, therefore, is not fettered, unless the irritant clause either name him or describe him.

APPLICATION
OF FETTERS TO
WHOLE MEM-
BERS OF ENTAIL.

M. 4409.

2 Paton's App.
225.

Sandford on
Entails, 241.

5 Paton's App.
522.

1 D. 81.

2 Rob. App.
109.

It is often difficult to determine whether the institute is, or is not,

"in the contrair, either by disposing, or committing treason or any other crime or delict, "or by contracting debts, or any other deed," "the said deeds should be null." This irritant clause was held to have been made upon the principle of enumeration, and that, as it did not specify alteration of the succession, it was defective; *Scott v. Scott*, 6th December 1855. 18 D. 168.

- PART III.**
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- 5 Dow's App. 72. included in the prohibitions; and this is a point which depends upon the intention of the testator, as gathered from the whole deed. A reference to the decisions will shew how nice are the distinctions in such cases. Thus, in *Steel v. Steel*, 24th June 1817, the comprehensive phrase, "heirs and members of tailzie," was held not to include the institute, because never employed in a connexion which proved unequivocally the testator's design to include him. In *Syme v. Dickson*, 27th February 1799, affirmed on appeal, the words, "person or persons, "heirs of tailzie foressaid," in the resolute clause were held to apply to the institute, because necessarily referring back to the terms used in the prohibition, which were these, "my son," (the institute,) "or "any of the other heirs of tailzie"—an expression necessarily including the institute in the description of heirs. The same rule was applied in *Douglas & Co. v. Glassford*, 14th November 1823, affirmed 10th June 1825, the words, "every heir or person so contravening," being held to embrace the institute, because he was specified *nomination* in the preceding context. The principle applies also to an imperfect comprehension of the substitutes within the restrictions, of which an example is presented in *Dalziel v. Dalziel*, 30th May 1809, where restrictions imposed upon the heirs-female of the substitutes were found not obligatory upon the heir-male of a female substitute, although he was an heir-male of the maker of the entail.
- M. 15,478;
4 Paton's App. 471.
- 2 S. 487.
1 Wil. & Sh. App. 323.
- F. C.

OBSERVANCE OF SOLEMNITIES REQUIRED BY 1685, c. 22. *Statutory requisites of strict entail.*—The legal jealousy of interference with the freedom of property is displayed not only in the rules of strict interpretation; the statutory solemnities required by the Act 1685 must be implicitly observed. These consist of the insertion of the fetters in the titles and investitures, and registration of the entail.

- INSERTION OF FETTERS.** (1.) *Insertion of the fetters.*—By its terms the Act enjoins insertion of the clauses irritant and resolute in the titles, and of the provisions and irritant clauses in the subsequent conveyances. In practice, the insertion of all the conditions, prohibitory, irritant, and resolute, has been invariably required and observed. The omission to comply with this injunction opens the estate to the diligence of creditors; *Murray v. Murray*, 5th July 1744. Although the Statute demands insertion both in the procuratories of resignation and precepts of sasine, it is settled by the same case, that, when both of these occur in the same deed, insertion once is enough. It is also decided, that the retour of a general service is not such a conveyance that the conditions must be inserted in it. The contrary was decided in *Stewart v. Denholm*, 1st February 1726, but reversed, 17th February 1737. In a special retour, as well as in other titles of investiture and transmission, the Act must be observed, and actual insertion is indispensable. A general reference infers a contravention, because it is a neglect of the solemnity; *Viscount*
- M. 15,601.
- M. 7275.
Cr. & St. App. 233.
- M. 15,596.

Garnock v. Master of Garnock, 28th July 1725. Therefore, the conditions must be inserted *verbatim* in the titles of every heir. Mere clerical errors in the investitures, however, do not affect the entail, if the estate is still clearly held under it upon the essential conditions. But an error which amounts to an omission of what is essential is a contravention; and where, by mistranslation, there had been a failure to import into the title the prohibition against sale, possession having followed upon the defective title for forty years, the estate was held open to the diligence of creditors; *Cathcart v. MacLaine*, 1st 8 D. 970.

July 1846. The investitures must contain the fetters, as these are contained in the entail, and it is not sufficient, that the investiture contains enough to constitute effectual fetters, if these do not correspond *in terminis* with the entail. Where, therefore, the entailer had distinguished the fetters into things to be done, which were called *conditions*, and things prohibited, which were called *restrictions*, and the resolute clause was carefully framed so as to strike against the omission of the conditions, and against acting contrary to the restrictions; but in the investitures that distinction was disregarded, the Latin charters and sasines embracing the whole stipulations under the single term *conditions*, it was held that the resolute clause was not here inserted in the charters and sasines as required by the Act 1685; *Holmes & Campbell v. Cunninghame of Craigends*, 13th February 1851. 13 D. 689.

It is no longer necessary to repeat the prohibitions, and irritant and resolute clauses, the omission of these in special services being dispensed with by 10 & 11 Vict. cap. 47, § 5—in dispositions and conveyances, and other deeds and instruments, by the Lands Transference Act, § 4—in the case of burgage conveyances, decrees, and other deeds and instruments, by the Burgage Tenure Act, § 3—and in the Crown Charters Act, § 26. A general reference to the record of the entail or of a sasine is substituted. Parties will no doubt avail themselves of this dispensation, and henceforth, accordingly, the inquiry, whether the prohibitions and clauses irritant and resolute have been duly inserted, will be limited to such investitures and titles as are of date prior to the periods fixed by the Statutes referred to respectively for their enactments coming into force.

(2.) *Registration of the Entail*.—This solemnity is necessary only to exclude the claims of creditors, for an entail is good *inter hæredes*, although it be not registered. The contraction of debt, therefore, not only subjects the estate to the creditor's diligence, when the entail is not recorded, but, being a contravention, it opens the succession to the next substitute, whose right under the entail, although not registered, is effectual in as far as not defeated by onerous deeds; *Willison v. Creditors of Dorator*, 8th December 1724. But a creditor's right cannot be defeated by an unrecorded entail; and, although the con-

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INSERTION OF
FETTERS, contd.

NO LONGER
NECESSARY TO
REPEAT FET-
TERS.

EFFECT OF NON-
REGISTRATION.

M. 15,371.

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REGISTRATION
OF ENTAIL,
contd.

ditions be insert in the titles, so that the creditor is made aware of them, and registration in the record of entails is not, therefore, necessary for his security, still, if it is not registered, he may adjudge, because he is entitled to every security which the law allows, and his claim cannot be cut off by anything short of that which the Statute says shall be necessary to cut it off; *Irvine v. Earl of Aberdeen*, 26th June 1765, affirmed on appeal. In *Ross or Munro v. Drummond*, 9th February 1836, upon a remit from the House of Lords, a unanimous opinion was returned by the Judges of the Court of Session, that an entail not registered is of no force, and equal to an entail not yet existent in reference to any third party contracting with the heir in possession—that the substitutes have no rights under the entail in regard to such creditors, and the debts are in the same situation as entailer's debts—and that the creditors in them cannot be affected by the subsequent registration of the entail. In *Montgomerie v. Earl of Eglinton*, 18th August 1843, there is reported a *dictum* of Lord BROUGHAM, to the effect that the Act 1685, as regards singular successors and purchasers, makes it still more important to have the entail recorded than to have fencing clauses, for it is the record they are to look to. This rule applies to entails made before 1685, which, notwithstanding old decisions to the contrary, are ineffectual if not registered; *Roseberry v. Baird*, 22d June 1765.

M. 15,617.

14 S. 453.

2 Bell's App.
149.

M. 5,616.

NEGLECT OF
REGISTRATION
OPENS ESTATE
TO CREDITORS,
UNLESS HEIR
NOT INFECT.Cr. & St. App.
113.

M. 10,260.

Hume, 870.

REQUISITES OF
REGISTRATION.

14 D. 944.

2 Macq. App.
205.

14 D. 127.

It is a limitation of this doctrine, that, in order to give the creditor access to the lands, infestment must have passed in favour of the heir in possession, because, if he possesses upon a personal title, that title is subject to the conditions by which it is qualified, and the creditor is excluded by these conditions, since he can only get at the estate by founding on the entail which contains them; *Denham v. Baillie*, 5th June 1733, already referred to, as reversed in House of Lords; *Creditors of Carlton v. Gordon*, 21st November 1753. See also Baron Hume's observations in *Napier v. Welsh*, 20th November 1805.

With regard to the sufficiency of the registration, we have seen that complete transcription is required even to the extent of inserting lands sold before the entail is recorded. In *Norton v. Stirling*, 6th July 1852, affirmed 22d May 1855, a critical objection to the warrant to record, and a trivial error in registering the resolute clause were disregarded. The date of registration is not the date of actual entry in the register, but the date of the warrant authorizing registration, and it is only from the date of registration, and not from the date of presenting the petition, or any date prior to registration by the granting of the warrant, that publication is held to have taken place; *Williamson v. Sharp*, 3d December 1851. A party is not bound to go down to any date subsequent to the date of his own right.

Neglect of the solemnities not only exposes the estate to the claims

of creditors, it is fatal also to the hopes of succession of the heir's substitutes, if the heir in possession shall choose to take advantage of the defect. If there is a failure in the prohibition to sell, the heir may sell, and the future heirs have no remedy. He cannot be forced to preserve or re-invest the price for their benefit, because he is not a trustee. He is absolute fiar, in so far as not fettered, and, when the entailer has failed to make an effectual entail under the Act 1685, the Court cannot do it for him. This point was tried in *Stewart of Ascog v. Fullerton*, 23d February 1827, and *Bruce v. Bruce of Tillycoultry*, 21st June 1827; and the Court of Session held the heir bound to re-invest the price. But the House of Lords reversed the judgment, 16th July 1830, establishing the rule which has just been stated. In the first of these cases the irritant and resolute clauses did not apply to sales. In the other there was no resolute clause. The effect is the same, where the neglect consists of the non-registration of the entail. In *Earl of Eglinton v. Montgomerie*, 22d January 1842, affirmed 18th August 1843, the entail was complete, but not recorded, and the heir in possession having sold was found entitled to retain the price without re-investment. Nor have the substitutes any claim to indemnification for such a disappointment of their expectations. The heir being fiar in so far as not fettered or precluded by registration, an act from which he was not precluded cannot subject him in damages. In *Marquis of Queensberry v. Duke of Queensberry's Executors*, 7th March 1828, reversed 16th July 1830, where leases had been granted in contravention of an unrecorded entail, the grantor's representatives were held not liable in damages.

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NEGLECT OF
SOLEMNITIES
DEFEATS RIGHT
OF INSTITUTEES,
WITHOUT IN-
DEMNIFICATION.

5 S. 418.
5 S. 822.
4 Wil. & Sh.
App. 196, 240.

4 D. 425.
2 Bell's App.
149.

6 S. 706;
4 Wil. & Sh.
App. 254.

Effect of Contravention.—We shall now inquire shortly what are the consequences of acts done by heirs of entail inconsistent with the conditions imposed by the entailer. If an heir contravenes the entail, and so commits an irritancy, by omitting to insert the conditions and clauses in his title—or if he neglect to use the prescribed name—or if he grant tacks exceeding the period permitted by the entail, or by the authority of custom and Statute—what is the result to his own right, and how is the irritancy made available to those entitled to benefit by it? The effect of an irritancy is to subject the heir who has committed it to action and decree of forfeiture. The act of contravention does not create an immediate active nullity in itself, or an instant self-operating forfeiture of the estate. The irritancy must be declared, and decree of forfeiture must be obtained. The heir in possession being fiar, his act, although at variance with the provisions of the entail, remains operative, and his title valid, until the one be challenged, and the other forfeited, at the instance of a party upon whom the entail has conferred an interest. This principle is illustrated

IRRITANCY MUST
BE DECLARED.

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M. 4788.

DECLARATOR
OF IRRITANCY.

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by *Gordon v. The King's Advocate*, 16th November 1750, where an heir of entail claimed the estate after forfeiture by treason, on the ground of irritancies committed previous to the treason; but the Court found, and this part of the judgment was affirmed on appeal, that the irritancy not having been declared, and no advantage taken of it before the forfeiture, the forfeiture could not be overreached or excluded on pretence of that irritancy. In the more recent case of *Agnew v. Gillespie*, 23d June 1813, a tack granted *ultra vires* was held not to be null *ipso facto*, but to require reduction. Lord MEADOWBANK here remarked:—"An heir of entail in possession is an unlimited fiar in every respect, unless the *jus crediti* which enforces the fetters is brought into action, and that must be by forms of law. Hence, no act in the face of the fetters is *ipso jure* null and void. All such acts are only reducible when challenged." From these views it results, that, if an act of contravention be not challenged within forty years, it will acquire prescriptive efficacy, and, if the act be calculated to induce a fee-simple title, *e.g.*, non-insertion of the fetters before the Statute dispensing with that solemnity, or an omission now to refer to them, the fetters will be entirely worked off.

M. 15,430.

Any substitute heir may pursue a declarator of irritancy. In *Dundas v. Murray*, 29th November 1794, the pursuer was the twenty-fifth substitute, and he was found not obliged to call the intermediate heirs.

EFFECT OF
CONTRAVENTION
ON CONTRA-
VENER'S DE-
SCENDANTS.
M. 15,384.
M. voce "Tail-
" sie," App.
No. 9.

When the effects of contravention are by the entail extended to the contravener's descendants, it is not competent to a descendant to object to the act of contravention; *Creditors of Gordon of Carleton v. Gordon*, 14th November 1749; and *Gilmour v. Hunter*, 6th March 1801. The statutory irritancy consequent upon non-insertion of the fetters by the express terms of the Act strikes against the heirs of the contravener, as well as himself. But this has been held to be limited to those cases in which contraventions are by the entail extended to the heir, the words of the Act being construed with reference to the entail itself; *Bontine v. Graham*, 2d March 1837, affirmed 6th August 1840.

15 S. 711.
1 Rob. App.
347.

PROCEDURE
AFTER DECREE.

After the irritancy is judicially declared, the next heir may set aside the contravener's title, and take possession. This he does, as prescribed in the Act 1685, by serving himself heir to him who died last infest in the fee, and did not contravene. This is a departure from the ordinary rule, which prescribes service to the ancestor last vested; but here the law regards the contravener as not having been infest, in order that the heir may enter free from liability for his obligations. Notwithstanding that legal fiction, however, it has always been held, that acts of ordinary administration done before contravention, *e.g.*, leases, and provisions to wives and children, remain valid, notwithstanding the irritancy. It was a difficult question

ACTS OF ORDI-
NARY ADMINI-
STRATION BE-
FORE CONTRA-
VENTION
REMAIN EFFECTU-
AL.

whether acts of a different kind, as, for instance, the mortgage of the lands for the life interest of the heir would remain effectual to the creditor, notwithstanding subsequent contravention and forfeiture of the grantor's right. But this question has been set at rest by the 40th section of the Entail Amendment Act, which exempts from the effects of irritancy the purchasers or creditors under deeds granted before execution of the summons of declarator, provided such deeds could validly be granted in consistency with the provisions of the entail.

There is also this general remedy for irritancies, that, if the act of contravention can be removed, and matters restored to the same position as if it had not been granted, the irritancy is allowed thus to be purged. So, where two heirs in succession had neglected to bear the name imperatively prescribed by the entail, the Court allowed the second heir to claim the estate upon yet assuming the proper name and arms; *Gordon v. Gordon*, 23d July 1738; and, in *Abernethie v. Gordon*, 20th June 1837, affirmed 11th August 1840, an heir having contravened by making up fee-simple titles, he was permitted to purge the irritancy by expeding a new title in terms of the entail, finding security at the same time that the estate should not be burdened by debts contracted during the subsistence of the fee-simple title.

PURGING OF
IRRITANCY.

M. 7281.
15 S. 1167.
1 Rob. App. 484.

Extinction of Entail.—Besides the mode of terminating an entail which has incidentally been noticed, viz., prescriptive possession under an inconsistent or fee-simple title, there are two natural contingencies which bring it to a conclusion, viz., (1.) The succession of heirs-portioners, and (2.) The succession of the person last called under the special destination.

It is not the design of the law of entail to transmit the estate in a divided form subject to the fetters, nor does any entail contain provisions for effectually doing so; and, therefore, when the succession opens to heirs-portioners, each one receives her portion as a fee-simple estate; *Hunter*, 11th December 1834. This may be obviated by debarring heirs-portioners, and declaring that the eldest shall always exclude the rest; but, wherever no such exclusion is made, the succession of heirs-portioners is always to be regarded as a contingency which may terminate the entail.

EXTINCTION IN
SUCCESSION OF
HEIRS-PORTIONERS.

13 S. 185.

Again, heirs whosoever or whatsoever are not heirs of entail. This was a phrase introduced originally, like heirs and assignees, to exclude first the superior, and afterwards the claim of the Crown as *ultimus hæres*. The terms do not, therefore, designate any particular heir, for whose protection the fetters were imposed. A destination to heirs whomsoever is to parties not specially favoured, and so not heirs of entail; and it makes no difference that heirs-portioners

EXTINCTION IN
PERSON OF LAST
SUBSTITUTE
CALLED BEFORE
HEIRS WHATSOEVER.

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14 D. 269.

16 D. 498.

15 D. 385.

M. 15,412.

10 S. 644.

TERMINATION
OF ENTAILS
UNDER ENTAIL
AMENDMENT
ACT.

§ 3.

§ 2.

INSTRUMENT OF
DISENTAIL.

among the heirs whomsoever are excluded; *Gordon v. Forbes or Mosse*, 19th December 1852; *Primrose v. Primrose*, 9th February 1854. The effect of heirs whatsoever in defeating the purposes of the entail is shewn by the passing of the estate to those who are strangers in blood to the entailer, when it has come to a female heir's child without issue, the father of such child succeeding. The estate is alienable by the party who succeeds as heir whatsoever; and, when the expression is "heirs and assignees whatsoever," the effect is the same, the term *assignees* not being restrictable to assignees of the entailer in order to support the fetters; *Steele v. Coupur*, 15th February 1853. Whensoever, accordingly, the estate devolves upon the person last specially called, and who stands immediately before "heirs whomsoever," he is entitled to possess the lands in fee-simple, the entail having accomplished its design, and so being at an end; *Earl of March v. Kennedy*, 27th February 1760; *Henry v. Watt*, 13th June 1832.

A new means of terminating entails is introduced by the Entail Amendment Act, the provisions of which, as regards entails dated before 1st August 1848, are the following, viz :—

Any heir of entail may acquire the estate in fee-simple, if he is the only heir living for the time, and unmarried. If the party is not the only heir in existence, he may disentail with consent of the three next heirs for the time who are entitled in their order to succeed, or with the consent of the two next heirs, each of whom would be heir-apparent—that is, the heir whose right of succession nothing but death can prevent. In either case, the heir next to the heir in possession must be twenty-five years of age and not under legal incapacity. When the heir-apparent of the age and capacity specified shall have been born after 1st August 1848, the estate may be disentailed with his consent alone; and, when the heir in possession shall himself have been born on or after the same date, he is entitled to disentail without any consent.

This power is carried into effect by executing and recording, under authority of the Court of Session, a writ called an instrument of disentail. The form is appended to the Act, and need not be repeated. The essence of it is, that the party takes instruments in the hands of a notary public, who subscribes along with him before instrumentary witnesses, that the lands are now held by him free from the conditions, provisions, and clauses prohibitory, irritant, and resolute, by virtue of the Statute. There is a consent to registration in the register of tailzies, books of Council and Session, and others competent. Of course, the prescribed terms of an instrument which produces effects so important must be very exactly followed. When executed abroad, it may be in presence of a British Consul, who, by 6 Geo. IV. cap. 87, § 60, may act in all matters requiring a

notary ; *Cunninghame*, 15th February 1850. When a petitioner for disentail dies, the next heir cannot be sisted in his place ; *Scott*, 16th July 1850.

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12 D. 743.
12 D. 1256.
REGISTRATION
OF INSTRUMENT.
§ 32.

The Keeper of the register of tailzies is to record this instrument in that register along with the decree of Court authorizing it ; and the effect of the instrument, when duly executed and recorded, is absolutely to free the estate, and the heir in possession and his successors, of all the prohibitions and clauses irritant and resolute, and to entitle the heir in possession to alter the course of succession, alienate onerously or gratuitously, burden with debt, or to do any other deed competent to a fee-simple proprietor, saving always the rights of third parties under deeds affecting the fee or rents of the estate. Provision is made in § 44 for the registration of the instrument of disentail, in all the registers of sasines, general and particular.

The mode of procedure with a view to this important act is by summary petition, the contents of which, with the intimation requisite, and the procedure in Court, are contained in §§ 33, 34, and 35. Any one who has an interest may appear at any time before extract, and object on any competent ground, the Court being bound to investigate and dispose of the objection. It is not necessary to call as parties any of the heirs, excepting those whose consent is required to an instrument of disentail. When consents are required, they must be duly tested, and in such form as the Court may prescribe, and, when given, they are irrevocable. The proceedings prescribed by the Act must of course be followed out with a precise exactness. They will be judged of with the same strictness as in *Hope v. Moncrieffe*, 26th January 1833, where, an advertisement prescribed by Statute having been omitted, the Court refused to approve of a sale, holding that they had no power to do so, unless the provisions of the statute were strictly complied with. The finality of the instrument of disentail, if not appealed against, is secured by the 38th section.*

PETITION FOR
DISENTAIL.

11 S. 324.

The Statute contains very careful provisions for the protection of creditors having claims upon the estate. Along with the application, the heir must give in a statement of debts upon oath, and the Court may order intimation, and make other provisions for their security. A creditor may protect himself by inhibition, and, if he uses this diligence within a year after registration of the instrument of disentail, that preserves his preference over all debts which could not have competed with his before the disentail. When the heir in possession is so circumstanced that he might disentail the property

STATUTORY
PROVISIONS FOR
PROTECTION OF
CREDITORS OF
THE ESTATE.
§ 6.

§ 7.

* Instruments of disentail may be first executed, and the sanction and authority of the Court to record the same afterwards applied for ; 16 & 17 Vict. c. 94, § 4. So also conveyances, excambions, &c., under the provisions of the Entail Amendment Act, may be executed without the previous sanction of the Court, and the authority of the Court afterwards interponed thereto ; § 5.

- PART III. without any consent, he cannot prevent his creditors from access to the estate by abstaining from the step. They are entitled to affect the estate in the same way as if an instrument of disentail had been duly executed and recorded. Provision has also been made for the protection of the creditors of heirs who have mortgaged their right of succession. Such heirs are not entitled to consent to the disentail, unless the Court upon inquiry shall find the creditors' opposition unreasonable, and disallow it. By § 9, this protection is given to all securities by heirs expectant for money borrowed made previous to the passing of the Act. When the loan is of a date subsequent to 1st August 1848, the protection is by § 10 limited to the creditors of the heir-apparent.
- CHAPTER III.
§ 11.
- § 9.
- § 10.

DISENTAIL,
WHERE ESTATE
SETTLED BY
MARRIAGE CON-
TRACT.
§ 8.

- When the estate has been settled by marriage contract upon the issue of the marriage, it cannot be disentailed, until either an heir exists, and consents by himself or his guardian, or until the marriage is dissolved without an heir born. The 31st section provides for the appointment of guardians to heirs who by reason of nonage or incapacity cannot themselves consent, a separate guardian being directed for each such party; *Hamilton*, 3d February 1853; and, if such guardians shall consent, the enactment provides for their indemnity, unless they be charged with acting corruptly in the matter.
- 15 D. 371.

MONEY, &c.,
MAY BE DISEN-
TAILED.

- The principle of the statute is extended to money and other property held subject to the conditions of the entail, and also to such property not actually entailed, but held in trust under directions to entail. By section 26 monies derived from sale or damage may, by the authority of the Court, be paid to the heir,* if he is entitled to acquire the estate in fee-simple by disentail; and trust monies or lands, directed to be entailed, may also be acquired in fee-simple by the party who, the entail being executed, would be entitled, if in possession, to disentail. But, in determining the power of the heir in such circumstances, he is to be regarded as under an entail not of future date, but the date, at which the statute, deed, or writing placing the money or property under trust or directing the entail came into operation, is to be held as the date of the entail.
- § 27.
- § 28.

- When the heir in possession is not so circumstanced as to be entitled to disentail, the Statute gives important facilities in the application and use of money deposited or held in trust. It may be laid out in payment of entailer's debts, or of other charges on the fee, or in redemption of land-tax, or in making improvements, or in repayment of expenditure for improvements. In *Richardson*, 22d June 1853, the question was reserved, whether the one-fourth not
- 15 D. 762.

* The tutor for a pupil heir of entail may get consigned money applied in payment of permanent improvements on the estate, by application to the Court of Session, a tutor being entitled to petition under § 26 of the Act, which gives the "*heir of entail in possession*" power to do so; *Stuart*, 10th February 1855.

17 D. 378.

recoverable under the Montgomery Act may not be paid out of the moneys referred to in this section.* By § 29, provisions may be granted out of such money to husbands, and wives, and children, upon the same terms as under the Aberdeen Act. By a decision of the Court, *Sprot's Trustees v. Sprot*, 11th March 1830, it was held competent to apply money held in trust for an entail to the erection of a mansion-house.

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8 S. 712.

All the acts permitted by this Statute may be done by the heir, whether the entail has been recorded or not, and also, whether he be infeft or not. This clause, however, will not enable the heir in possession to do anything which is incompetent by the ordinary rules of law. He will not, for instance, be able to grant a bond and disposition in security with an effectual warrant, if he be not himself infeft.

STATUTORY
POWERS UNDER
AMENDMENT
ACT MAY BE
EXERCISED,
THOUGH ENTAIL
NOT RECORDED.

The 45th section provides, that no irritancy shall be incurred by doing what is permitted by the Act, and that it shall be effectual notwithstanding the prohibitions in the entail; and the Act of 1685 is repealed by the next clause, in so far as necessary to make the provisions of this Act operative, but no farther.

New Entails.

The full examination which we have bestowed upon the form and effects of entails dated prior to 1st August 1848 reduces within a narrow compass the observations necessary with respect to entails made subsequent to that date. In determining the date of a new entail, and whether the heir possessing under it be entitled to the higher privileges as regards disentailing provided by the Act, we must of course keep in view the rule already noticed, that entails made by direction of Statute, or the party's deed, which Statute or deed had become operative before 1st August 1848 are to be held as of the date of the Statute or deed, whatever may be the date of the entail itself; and it is only entails, founded upon authorities or deeds which did not become effectual until after the statutory period, that are to be held of a later date, and entitled to the privileges of new entails.

It is unnecessary to examine the form of the new entail. Adopting the abbreviations of the Lands Transference Act, and setting forth all the conditions, prohibitions, and limitations, under which the entailer desires the estate to be possessed, their terms will not differ otherwise from the old entail, excepting in one most important particular directed by the 39th section of the statute, viz, that it is not necessary to insert in them any irritant or resolute clauses,

IRRITANT AND
RESOLUTIVE
CLAUSES DIS-
PENSED WITH.

* The improvements contemplated by § 26 of the Entail Amendment Act are *permanent* improvements; and they may be made out of consigned money, although the powers of the heir of entail under the Montgomery Act may already have been exhausted: *Fleeming*, 17th February 1855.

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provided they contain an express clause authorizing registration in the register of tailzies, such clause being declared to have in every respect the same operation and effect as the most formal irritant and resolute clauses duly applied to every prohibition, condition, restriction, and limitation, contained in such tailzie, excepting such of the conditions as may be specially excepted.

RESERVED
POWERS OF
NOMINATION
OF HEIRS, &c.
5 Wil. & Sh.
App. 515.

The new entail may, no doubt, reserve power to alter, revoke, &c.; and, as we have already seen, heirs may effectually be nominated under reserved powers. In *Stewart v. Porterfield*, 23d September 1831, such a nomination was found effectual to prefer a party favoured by it to the exclusion of a remoter substitute, even after forty years' possession upon the entail alone.

EFFECT OF NEW
ENTAIL.

DISENTAIL.

With regard to the effect of a new entail—by the 1st section of the statute, any heir born after its date may, with the authority of the Court, execute an instrument of disentail, and possess the estate in fee-simple;* and any heir born before the date of it may disentail, provided he has the consent of the heir-apparent, who, in order to validate his consent, must be born after the date of the entail, twenty-five years of age, and not subject to any legal incapacity.

MONTGOMERY
AND ABERDEEN
ACTS NOT AVAIL-
ABLE, WHERE
NEW ENTAIL.

The heir possessing under a new entail is excluded by § 12 from from availing himself of the powers under the Montgomery and Aberdeen Acts. When, therefore, it is intended that the heir under a new entail shall have power to contract debt for improvements, or to grant provisions to a wife, or husband, or children, these acts must be specially authorized by the entail itself†

CONDITIONS,
&c., NEED NOT
BE REPEATED.

In consequence of the dispensation contained in the Lands Transference Acts and other contemporaneous statutes, it is no longer necessary, of course, to repeat the conditions and prohibitions of the entail in instruments of sasine, and subsequent transmissions and investitures, provided due reference is made to these as already set forth in the recorded entail, or in a recorded instrument of sasine. Besides such reference to the conditions and prohibitions, it seems necessary, with respect to new entails, that there shall be a special reference to the clause of registration, if it is not inserted, the registration of this clause in the register of tailzies, and its insertion, or a reference to it, in the subsequent titles being anxiously required by the 39th section, in the same manner, or nearly so, as irritant and resolute clauses are now required to be inserted or referred to.

HEIR BORN
AFTER DATE
OF NEW ENTAIL
MAY DISENTAIL.

The law of entail is now limited as regards new entails to this effect, that any heir in possession born after their date may after his majority acquire the property in fee-simple; and very careful provision has been made by the Act to defeat any attempt to create a virtual entail of more extended endurance by other expedients. By § 47, the beneficiary under a trust, born after the date of the

* See *supra*, note, p. 729.

† See also 16 & 17 Vict. c. 94, §§ 12, 13.

deed, may when of full age acquire the rights of fee-simple proprietor. Section 48 limits the power of granting a liferent interest to any party in life at the date of the grant, and any party born after the date of the deed is to be held proprietor in fee-simple; and section 49 makes a similar provision to prevent the creation of interests of longer endurance by means of leases.

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III. JUDICIAL TRANSMISSION.

We are now to examine transferences of heritable subjects, effected not by the warrant of the proprietor, but by the act of the Law. There is a mode of judicial transmission available to creditors in satisfaction of their claims by the process of adjudication. That proceeding, however, creates only a security in the first instance, and does not operate as a transmission, until certain ulterior steps are taken after the expiration of the period allowed by law to the proprietor to redeem. The forms which we are now to treat of are those which make an immediate and complete legal conveyance by judicial authority; and there are two leading purposes for the attainment of which the law thus interposes, viz, *First*, On the ground of a high expediency, in order to prevent the expense, delay, and confusion attendant on a competition by creditors, the debtor's heritable property may be judicially sold, and the proceeds paid to the creditors according to their rights of preference. *Secondly*, Where the proprietor has granted an imperfect conveyance, or an obligation to convey, upon his refusal or incapacity to complete such transference, or fulfil the obligation, the Court will supply a complete judicial transmission.

For the payment of debt, heritable property may be judicially sold by the process of ranking and sale, or in a mercantile sequestration.

The process of ranking and sale may be at the instance of creditors, or of the heir.

1. *Ranking and sale at the instance of creditors.*—The sale of the debtor's lands to satisfy his creditors was allowed at an early period. An Act of Alexander II. prescribes the modes of selling the lands of debtors, when they have not moveable goods, the Sheriff and his officers being directed, after fifteen days' notice to the party, to sell enough of his land to satisfy the creditor of his principal sum with damages, expenses, and interest. The Act 1469, cap. 36, gave to the debtor the power of redeeming his lands within seven years, (ordinarily called the *legal*, i.e., the legal period within which redemption may be made,) and during that time the right of the appriser was restricted to possession merely. Under this Statute the process of apprising, involving important judicial functions, was exercised by

Thomson's
Acts, i. 371.

1469, c. 36.

- PART III.** messengers-at-arms ; but this being unsuitable and inconvenient, the jurisdiction was removed from them to the Court of Session by the
CHAPTER III. Act 1672, cap. 19, which introduced adjudication in place of apprising. This is a process competent to individual creditors for their own private rights, and, being of the nature of a redeemable security, it will be considered afterwards in treating of diligence against the heritable estate. The judicial sale of estates, and division of the price among competing adjudgers or other heritable creditors, was
 1681, c. 17. introduced by the Act 1681, cap. 17, which empowered the Court of Session, at the suit of a real creditor, to appoint commissioners to sell the debtor's heritable estate by public roup, and to distribute the price among the creditors. By this Act the debtor's consent was requisite where he was entitled to a legal reversion ; and, as such consent was reluctantly given, and the office of commissioner not willingly exercised, the Act 1690, cap. 20, was passed, in order to remove these difficulties, and it made the sale competent, without the debtor's consent, whenever it was ascertained that he is bankrupt and utterly insolvent.

**OBJECTS OF
RANKING AND
SALE.**

**SEPARATE AC-
TIONS AT FIRST
REQUIRED.**

**QUALIFICA-
TIONS OF PUR-
SUER.**

iii. 438.

The action of ranking and sale has three objects, viz.—1. The sale of the estate, with the adjudication of it, and declarator of its irredeemable transference to the purchaser ; 2. Enforcement of the appearance of creditors, and production of their claims and grounds of debt, with the investigation of these claims so as to ascertain the legal order of priority ; and, 3. The distribution of the price according to the order of ranking thus fixed. For these purposes separate actions were at first required, viz., 1. an action of sale ; 2. an action of reduction-improbation to try the challenges by the creditors of each other's claims ; and 3. a multiplepinding to divide the price. The purpose and effects of these various proceedings are now attained by the single process of ranking and sale.

The terms of the summons will be found in the Juridical Styles. The pursuer of it must, in terms of the Statute, be a real creditor by adjudication, bond and infestment, or otherwise. He or some other creditor must be in possession of the debtor's heritable property. For such possession an action of maills and duties (a suit by which a creditor obtains right to levy the rents) is sufficient. The creditors are also held to be in possession when the rents are sequestrated ; and sequestration is competent when the estate is the subject of judicial competition.

**TERMS OF SUM-
MONS.**

The summons narrates the pursuer's ground of debt, whether consisting of a voluntary heritable security, or of a decree of adjudication. It founds also upon the bankruptcy of the proprietor, and the possession of his estate by his creditors ; and it concludes, in the first place, that proof should be taken of the value of the lands, (which are described,) and the title-deeds produced. It is necessary that the

whole lands belonging to the bankrupt be included, because otherwise the bankruptcy cannot be proved. The omission of any part, therefore, stops the sale; *Macpherson v. Tod*, 25th December 1784, and previous case of *Monro v. Monro*, 11th January 1749. It is sufficient, however, by Act of Sederunt, 17th January 1756, § 12, to enumerate all the lands known to the pursuer, adding a general clause of all the other heritable subjects pertaining to the defender, or to which he shall succeed; and this is accordingly done in the ordinary style. The titles are called for, and recovered by diligence, in order to prove the holding and duties; and other documents are also required to be produced to show the annual burdens, &c. The production of the titles is not, however, essential to the progress of the sale, and where, from being hypothecated, or any other cause, they cannot be obtained, the action may proceed without the production; *Findlay v. Mackintosh, &c.*, 20th July 1842, affirmed 10th July 1845. The summons may include the properties of two or more debtors, if they are all bound by the same deed; *Watson v. Craigs & Others*, 5th March 1761. While it is necessary to insert the debtor's whole properties, that does not prevent other parties from exercising rights in regard to any portion of the property which they have validly acquired. An heritable creditor having power to sell is not necessarily hindered from exercising that power by an action of ranking and sale; *Simson, &c., v. Graham*, 25th November 1831; and, if he is the only creditor infest, with an assignation of the rents, and in possession, he may stand upon his own right, and require the subjects to be excluded from the sequestration under the ranking and sale; *Robertson v. Ferrier*, 12th December 1833. And the holder of a missive of sale of any part of the subjects is not precluded from adjudging in implement to the effect of excluding his purchase from the process; *Wood v. Scott*, 5th February 1833. The summons next concludes to have all the real creditors ordained to produce their grounds of debt, diligence, &c. The production is enforced by a certification, that, if not produced, they shall be held to be false and forged, as in a reduction-improbation. Then, there is a conclusion for ranking the creditors upon the rents and price, according to their preferences; and a conclusion to have the debtor declared bankrupt as introductory to the conclusion for sale, adjudication to the purchaser, and his infestment. This was formerly procured through the medium of a decerniture, ordaining the superiors to grant charters and infest him, and on failure thereof, that letters of horning should be issued against them. By the Lands Transference Act the Court is empowered to grant warrant for infestment directly, as we shall afterwards see. The last conclusion is, that the creditors be ordained to assign their securities to the purchaser in fortification of his title.

The defenders to this action are the debtor or his apparent heir,

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M. 13,363.

M. 13,362.

SUMMONS MUST
CONTAIN WHOLE
ESTATE.CONCLUSIONS
OF SUMMONS.

4 D. 1550.

4 Bell's App.
361.

M. 11,997.

10 S. 66.

12 S. 203.

11 S. 355.

DEFENDERS.

PART III and all the other real creditors in possession. These must all be
CHAPTER III. made parties. Personal creditors are also called generally, but that only by edictal citation.

**IF PURSUER
DIE.**

If, in the course of the suit, the pursuer shall die, or desist from pursuing, or if his claim shall be liquidated, the action may be taken up, and carried on by the judicial factor, or any real creditor, (Act of Sederunt, 23d November 1711, § 4,)—a privilege extended by 54 Geo. III. c. 137, § 10, to any creditor who is in a situation to adjudge; and it is not necessary to call the heir of the previous pursuer; *Montgomerie v. Maxwell*, 6th January 1750. The process may be continued in the same manner, if the pursuer's ground of debt shall turn out to be void under the Stamp Acts; *Dunmore v. Dickson*, 11th July 1835.

M. 13,323.

13 S. 1107.

**IF DEFENDER
DIE.**

On the other hand, if the debtor die, or any creditor defender, the process proceeds immediately upon the heir of such party being called, which is done by petition for letters of diligence to cite the heir, and his tutors and curators if he is a minor; *Keith*, 27th November 1776.

5 Br. Supp. 562.

COMMON AGENT.

The interest of the creditors generally is provided for, and the procedure simplified, by the appointment of a common agent, elected by the creditors to conduct the case, and to act for the common behoof. The duties of this officer are prescribed by Acts of Sederunt, 17th January 1756, and 11th July 1794. They are very important, embracing all that is necessary for the general security and interest of the creditors, in ascertaining the nature and extent of the subjects under sale, the burdens affecting them, and preparing states of the creditors' claims, shewing whether there is any probability of a reversion. The common agent may not litigate at the joint expense questions only affecting the interests of individual creditors; but it is his duty to compel those engaged in such discussions to proceed without delay. He is required by the Acts of Sederunt to keep a minute-book of his correspondence and procedure, which must be accessible to all concerned. In *Ferrier v. Rose*, 25th February 1836, the common debtor was found entitled to require production of the minute-book in the process; and, generally, the common agent is amenable to the control and supervision of the Court upon summary application.

4 S. 559.

**PROOF OF RENTAL OF
SUBJECTS.**

The procedure as regards the sale is directed in the first place to ascertaining the rents and value of the subjects. Evidence of the rental and burdens is taken upon commission, and this proof serves, in the first place, to establish the bankruptcy, which is held to be made out, if the interest of the debts exceeds the rents. But, if there be a mercantile sequestration, that circumstance, by 54 Geo. III. cap. 137, § 7, affords of itself evidence of the bankruptcy. Diligence for adducing the requisite proof is obtained at the beginning of the process, and the common agent can obtain letters of second diligence whenever required. The proof must be formal and regular, and therefore, where it did not bear that the witnesses had been sworn, a

new remit was made to take and report the proof in correct form ; **PART III.**
A. B., 20th February 1838. The result of the proof is embodied by **CHAPTER III.**
the common agent in a memorial and abstract, which the Court exa- 16 S. 630.
mines by remit to the Lord Ordinary.

When the Court is satisfied, the upset price is fixed, the sale ordered **THE SALE.**
to proceed before the Lord Ordinary, and warrant given for intimation
and edictal citation in terms of the Act of Sederunt, 24th September **A. S., 24th**
1838. On the day appointed, the Lord Ordinary puts up the lands for **Sept. 1838.**
sale within the Parliament House. It is doubtful whether the Court
has power to authorize a sale anywhere but in Edinburgh ; *Renny*, 12 S. 479.
22d February 1834. The common agent cannot purchase ; *York* **M. 13,367.**
Buildings Co. v. Mackenzie, 8th March 1793, reversed on appeal. **4 Dow's App. 380.**

Should a sale not be effected, the Court never parcel the estate out
among the creditors, as empowered by the Act, but reduce the upset
price, and fix a second day of sale, which must be intimated ; *Murray*, 15 S. 499.
9th February 1837. When a sale is effected, the Court adjudges to **DECREE OF**
the highest bidder the irredeemable property, or such interest as the **ADJUDICATION**
debtor had in the lands. If, for instance, he be an heir of entail, the **AND SALE.**
lands are adjudged with all right which he had, but excepting such
right as would, if adjudged, infer an irritancy ; and the effect of the
sale in this instance is necessarily limited to the life of the debtor ;
Scottish Union Insurance Company v. Cunningham Graham, 19th 1 D. 532.
January 1839. By the decree the purchaser obtains right to the
lands, free of all burdens, although postponed securities may remain
unsatisfied ; and, even if there be preferable securities, the creditors in
which have neglected to appear, these, by virtue of the certification
and the ranking, are extinguished as effectually as if reduced on the
head of falsehood and forgery. The decree of sale, accordingly, de-
clares the lands for ever exonerated and discharged of all debts and
deeds of the bankrupt, his predecessors, and authors. With regard to
a form of a decree of sale, reference may be made to *Swete v. Gordon*, 11 D. 679.
&c., 20th February 1849, in which, upon special application, the
Court adopted a fuller form of the decree than had previously been
in use.

This decree, which is the writ of transmission, may be extracted
as soon as caution is given for the price, but the sale is not held to be
completed until payment, the lands being charged with the price,
while it remains unpaid.

By the Act 54 Geo. III. cap. 137, § 6, the purchaser may consign **CONSIGNATION**
the price in any one of three banks named in the Act, at any term of **OF PRICE.**
Whitsunday or Martinmas subsequent to the term of payment, and,
if he delays to consign, he may be required to do so at the instance
of the creditors. Consignation is competent only in the manner pre-
scribed by the Act, and the Lord Ordinary may not alter the articles
of roup, so as to enable the purchaser to consign immediately ; *Hun-* 7 S. 270.

PART III. *ters & Company v. Bowie*, 16th January 1829. Nor will consignment

CHAPTER III.
13 S. 116.

in any other bank, though chartered, be sustained, because not authorized by the Statute; *Dunmore v. Dickson*, 2d December 1834. And, generally, the Court will not sanction any deviation from the articles of roup; *Rose*, 10th July 1835.

13 S. 1094.

**DISCHARGE OF
PRICE.**

The purchaser obtains a discharge of the price and delivery of his bond of caution, upon application to the Court. When there is more than one purchaser, there must be a separate application for each; *Learmonth*, 16th June 1838.

16 S. 1144.

**COMPLETION OF
PURCHASER'S
TITLE.**

The decree of sale is equivalent to an irredeemable adjudication and disposition of the lands, and entitles the purchaser to go to the superior for an entry. Before the Lands Transference Act his right could not be made real until he obtained the superior's warrant for infeftment, but by that Statute the Court is empowered to grant warrant, in terms of schedule K., for infefting the purchaser and his heirs and successors in terms of the 19th section, which gives to this infeftment the effect of an alternative holding. The decree thus contains a precept, and the Act goes on to point out the way in which the title may be completed:—*First*, the purchaser is entitled to obtain a charter of sale from the superior, and to pass infeftment thereon; or, *secondly*, if the debtor was entered with the superior, or had a title capable of being confirmed, then the purchaser may take infeftment upon the decree according to a form prescribed by the Act, and the decree and infeftment are declared to form an effectual feudal investiture, holding base of the party adjudged from until confirmation; but reserving the superior's right to the composition which becomes due by the purchaser's infeftment upon the superior tendering a charter of confirmation, whether accepted or not. The base infeftment in this case is declared to be effectual, although the title may contain a prohibition against subinfeudation. It will be carefully noted, that the provision in the Statute for the completion of a base right in the person of the purchaser applies only where the debtor was infeft. If he was not infeft, but had right to an open procuratory or precept, these must, of course, be used in the completion of the title, and the decree of sale furnishes the means of doing so by transferring to the purchaser the writs and evidents with their whole clauses and contents.

**ASSIGNATION
OF SECURITIES.**

A. S., 31st
March, 1685.

The purchaser's title is fortified by assignation of the rights of the creditors who are preferred to the price. In terms of the Act of Sederunt, 31st March 1685, the decree of sale ordains them to convey to him upon payment their debts and diligences in corroboration of his title, with absolute warrandice to the extent of the sums received by them respectively, which they are bound to repay in the event of eviction with interest from the date of eviction, provided they receive notice of the summons. The debts are in this way kept

alive, but that only for the exclusive purpose of strengthening the purchaser's title. In every other respect they are extinguished, and it is vain to attempt to keep them up as a security affecting the lands; *Seton v. Scott*, 10th July 1788; affirmed on appeal, 7th April 1789. The title of the purchaser is thus rendered as effectual as the common debtor and the creditors can make it; but it must carefully be kept in view, that the sufficiency of the title in the purchaser's person necessarily depends upon the character of the title which belonged to the debtor. The process professes only to give to the purchaser that right to the lands which belonged to the debtor, supported by assignments of the securities flowing from the debtor. It is impossible, therefore, that the purchaser's right can rise higher than that of the debtor stood; and, if one having a better title to the estate than the bankrupt should appear, he will be entitled to evict the lands from the purchaser; *Urquhart v. Officers of State*, 28th July 1753.

PART III.
CHAPTER III.

M. 13,371;
Hailes, 1054.
PURCHASER'S
TITLE NO
BETTER THAN
DEBTOR'S.

M. 9922.

We have seen that the summons contains a conclusion for ranking the creditors, and this part of the process proceeds simultaneously with the other. Certain terms are assigned by the Court, against which the creditors must produce their grounds of debt and diligences. These terms are published in the Edinburgh Gazette, and, by Act of Sederunt, 17th January 1756, the neglect of them has the same effect as decree of certification pronounced in an action of reduction-improbation at the instance of each creditor compearing against those who fail to compear. The securities not claimed upon are thus excluded from participating in the price of the estate, unless there shall be a surplus to the bankrupt. In order to obviate the expense of separate measures, the decree of sale was, by the Act 54 Geo. III. cap. 137, § 10, ordained to have the same effect as an adjudication in favour of all the creditors ultimately included in the division of the price; and this effect it receives, as if pronounced at the first calling of the process of ranking and sale before the Lord Ordinary in the Outer House. Each creditor has thus the same preference secured to him, as if he had pursued a process and obtained a decree of adjudication; and separate adjudications for debt are, therefore, prohibited by the enactment referred to.

THE RANKING.

DECREE OF
RANKING HAS
EFFECT OF
ADJUDICATION.

The common agent prepares a state of interests, in which the creditors are classified according to the priority of their rights. The place in the ranking depends, therefore, upon priority of infeftment or diligence, and also upon the sufficiency of the instruments constituting the debt. In *Mackintosh v. Inglis and Weir*, 17th November 1825, a creditor's sasine having been blundered, an attempt to remedy the defect by a second infeftment was found to be ineffectual on account of the prior infeftment of the purchaser. Even after decree of preference and payment, a creditor is bound to repeat, if it turns out that he had no security. In *Keith v. Grant, &c.*, 14th November 1792, it was ascertained after payment, that the debtor had never

STATE OF
INTERESTS.

PRIORITY OF
INFESTMENT OR
DILIGENCE
RULES.

4 S. 190.

M. 7933.

- PART III. been infest in part of the lands, and this portion of the security hav-
CHAPTER III. ing, therefore, been inept, the creditor's representatives were ordained
to repeat the amount paid from that part of the security. The whole
sums, principal and interest, are reckoned as capital at the term of
the purchaser's entry when the price is payable, and he must account
for the price on that footing; *Falconer v. Mackintosh's Trustees*, 30th
November 1814.
- F. C. The expenses of the sale are advanced by the factor from the rents,
or paid out of the first end of the price, so that they fall upon the
postponed creditors; *Act of Sederunt*, 10th August 1754. Loss by
the failure of the purchaser or otherwise also falls upon the postponed
creditors; *Murray v. Blair*, 27th November 1793.
- EXPENSES OF SALE. It was formerly necessary that the ranking should be concluded
before the sale, but by the Act 54 Geo. III., cap. 137, § 6, the sale
may proceed as soon as the necessary steps have been taken, whether
the ranking is concluded or not; and any interest which purchasers
formerly had to obstruct the ranking, in order to defer payment of
the price, is removed by the provisions for forcing them to consign.
- M. 13,343. The various steps of procedure with regard to the preparation of a
scheme of division, and the discharge of the factor will be found ex-
plained in Mr. Shand's work, and other treatises in relation to the
practice of the Court of Session. We proceed to examine shortly
2. *The Judicial Sale at the instance of an apparent heir.*—This is
authorized by the Statute 1695, cap. 24, which allows apparent heirs
to bring the estates of their ancestors to judicial sale, whether there
be a bankruptcy or not, no third party having any interest to object
to such a proceeding. This is only competent to the heir during his
apparency, and the privilege is, therefore, removed by his service. It
is competent, though he has incurred the passive title of behaviour as
heir; *Blair v. Stewart*, 28th February 1733. It is competent, though
there be an entail, if the entail has not been made real by infestment;
1695, c. 24. *Mitchell, &c. v. Tarbutt, &c.*, 4th February 1809. It was allowed,
although the heir had been served *cum beneficio inventarii*. Although
the heir may have renounced the succession in an action of constitu-
tion at the instance of a creditor, that does not debar him from insti-
tuting a process of ranking and sale; *Smith v. Harries*, 3d March
1854, and the case of *Belshier v. His Heir*, March 1776, there cited.
- JUDICIAL SALE BARRED BY HEIR'S SERVICE. A sale by the party believed to be *bonâ fide* the apparent heir is
effectual, and, although a nearer heir should afterwards appear, he
has no recourse against the purchaser; *Middlemore v. Macfarlane's*
Representatives, 5th March 1811. The creditors are not allowed to
interfere with the heir's right to carry on the sale; *Hamilton's Credi-*
tors, 29th June 1749; and, upon the death of the pursuer, the next
apparent heir and the purchaser have been found entitled to carry on
the process; *A. v. B.*
- M. 5247. 16 D. 727.
5 Br. Supp. 561; Hailes, 693.
SALE BY PARTY *bonâ fide* BELIEVED TO BE HEIR.
F. C. M. 13,323.
Elchies, voce
"Ranking and
"Sale," No. 22.

Of the summons a form is given in the Juridical Styles, and its terms are generally the same as when the pursuer is a creditor, with the exception that in this case there is no allegation or evidence of bankruptcy required, the proof being limited to the value of the lands. The sale is in the same form and place as when a creditor pursues. The purchaser obtains a decree of sale with the same facilities for completing his title, and the decree operates as an adjudication in favour of all the creditors at the first calling of the process, separate adjudications being here also discharged.

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When there is a surplus of the price after satisfying the claims, warrant is granted for payment of it to the heir, although he decline to enter, the decree of sale being an adjudication for his behoof, as well as that of the others concerned, and a sufficient title to him to take up the reversion; *Middlemore v. Macfarlane*, 2d February 1833. A different rule holds with regard to a surplus when a creditor pursues, the apparent heir in that case being bound to make up a title to the lands to authorize him to receive it; *Stirling v. Cameron*, 21st July 1742.

HEIR TAKES
SURPLUS WITH-
OUT SERVICE.

M. voce "Heir
"Apparent,"
App^r. No. 2.

Elchies, voce
"Ranking and
"Sale," No. 8.

By Act of Sederunt, 10th August 1754, the rule as to the expenses is the same as in a sale at the creditor's instance, the burden being laid upon the creditor least entitled to preference, and the heir himself liable to no part of it; *Mackail v. Brown*, 6th March 1761.

EXPENSES.

M. 4029.

We may notice here two other modes of judicial procedure for selling lands, in which, however, the sale is not made directly by the Court, but by the party under its authority.

COGNITION AND
SALE, FORM OF
SUMMONS.

Cognition and sale at the instance of a pupil and his tutors.—

This takes place, when the estate of a pupil is overburdened with debt. The summons sets forth the pupil's title, the extent of the succession, the moveable estate being specified in an inventory, and that the interests of debts, and the other annual payments, are equal, or nearly equal, to, or exceed, the rents—that thus there is no funds to aliment the pupil, and that the creditors threaten to adjudge. The summons, therefore, concludes that the Lords should take cognition of the amount of debts and yearly value of the lands, the creditors being ordained to exhibit and depone to their rights and diligences. There is next a conclusion that a sale should be declared necessary, and then that warrant be granted to the pursuers to dispose the lands and grant conveyances, the same being declared as effectual as if granted by the pupil after majority.

Jurid. Styles,
vol. iii. p. 455.

The procedure is such as to give effect to these conclusions. It is only after the solemn inquiry thus made, that the Court will, in the event of urgent necessity being established, authorize the sale of a pupil's estate, as we have already seen in the case of *Finlaysons v. F. C. Finlaysons*, 22d December 1810. There is here no judicial act of

SALE CAN ONLY
BE ON URGENT
NECESSITY.

PART III. transmission, but a conveyance granted by the pupil and his tutor
CHAPTER III. under the authority of the Court.

Action of division and sale at the instance of heirs-portioners.—
These also are proceedings to have the lands divided, or, if they are
not capable of division, sold, and the price divided, not by a judicial
act, but by the parties under the authority of the Court. The forms
iii. pp. 145, 147. of the summonses, which will be found in the Juridical Styles, are
explanatory of the procedure. The Court will not authorize a sale
without proof that the subjects are incapable of division. This was
15 S. 486. required, even where there was no appearance, the subject being an
inn ; *Bryden v. Gibson*, 4th February 1837.

The next mode of judicial sale of lands for the payment of creditors
is under

MERCANTILE
SEQUESTRATION.*

3. *The Mercantile Sequestration*, which also presents an example
of transference by the mere act of the law from the bankrupt to the
trustee in the first instance.

TRUSTEE'S
TITLE.

It is very important to keep in view the nature and effect of the
judicial transmission of the heritable estate from the bankrupt to his
trustee. We are all aware, that, in the first place, sequestration is
awarded of the whole estates, heritable and moveable, of a bankrupt,
qualified by trade, and by the amount of his liabilities, to have his
affairs adjusted by that proceeding. The sequestration is effectual
from the date upon which it is awarded, or, if it be not awarded at
first, still it is by the 24th section of the Act, 2 & 3 Vict. c. 41, made
effectual from the date of the first deliverance. An interim factor is
by 16 & 17 Vict. cap. 53, (which makes certain alterations upon the
enactments of the previous Statute,) appointed by the Lord Ordinary
or by the Sheriff on a remit from him. At a meeting held at a
specified distance of time the creditors elect a trustee. The whole
estate, heritable and moveable, of the bankrupt becomes vested
in the trustee by virtue of an act and warrant of confirmation
pronounced by the Sheriff after his election. We have already
found, that the effect of this title is to transfer the moveable
estate of the bankrupt to the trustee, as at the date of the seques-
tration, absolutely and irredeemably, and no imperfect security,
therefore, as an unintimated assignation, can be completed after the
date of the sequestration, so as to compete with the trustee's title.
But it is different with regard to the heritable estate. By section
79 of 2 & 3 Vict. cap. 41, it is enacted, "that, by virtue of the act
"and warrant, the whole heritable property in Scotland shall be
"transferred and vested in the trustee for behoof of the creditors,

* Mercantile sequestration will, on and after the 1st November 1856, be regulated by
19 & 20 Vict. c. 79, passed to amend and consolidate the laws relating to bankruptcy in
Scotland, and repealing the Acts 54 Geo. III. c. 137, 2 & 3 Vict. c. 41, and 16 & 17 Vict.
c. 53, to which Statutes the statements in the text refer.

"absolutely and irredeemably, as at the date of the sequestration, "to the same effect as if a decree of adjudication in implement, as "well as a decree of adjudication for payment and in security of "debt subject to no legal reversion, had been pronounced in favour "of the trustee, and recorded at the date of sequestration." Now, in order to determine the effect of this title, we must refer to the position of a creditor holding a recorded decree of adjudication. That, we shall presently find, is a transmission, whereby the holder may obtain a real right in the lands, but it does not of itself constitute a real right. An entry from the superior must be obtained, and upon his warrant, or by using an unexecuted warrant transmitted by the adjudication, the adjudger must be infest. That then is the precise position in which the act and warrant of confirmation places the trustee, and it is his duty, wherever competition is apprehended, to use instant diligence to make his right real for the benefit of the creditors. The act contains various provisions to facilitate this.

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By § 87 the bankrupt must grant all deeds necessary for feudally vesting the trustee. If, therefore, there is reason to suppose that the bankrupt has granted any security or conveyance not yet completed, the trustee should immediately procure from him a disposition, which cannot be challenged on the ground of a prior inhibition, the right of the trustee being by § 79 exempted from the effect of that diligence. If a disposition cannot be procured, then the trustee must endeavour to procure a charter of adjudication from the superior. His preference to the individual creditor's right will depend upon his obtaining infestment upon the disposition or charter before the creditor is infest.

HOW MAY TRUSTEE MAKE HIS RIGHT REAL.

If the bankrupt's right was incomplete, the trustee may by § 87 complete titles in his own person, or in the person of the bankrupt. The bankrupt may have granted securities, while his own right was personal, and, by the rules already explained, the completion of his title would accresce to such securities. That would establish a preference inconsistent with the trustee's duty to the other creditors. He must, therefore, make use of the bankrupt's personal right, which is transmitted to him by the act and warrant, to complete the title in his own person, taking care that this be done in such form that his own title will be valid independently of any infestment in the person of the bankrupt. If, for instance, the bankrupt's personal right be that of apparenry, it would defeat the trustee's object to take disposition from him; because such a right could only be validated by completing the bankrupt's title. The personal right being transmitted by the act and warrant, the trustee's course is to obtain charter of adjudication, which the superior is by this clause required to grant, and thereupon to take infestment. It appears doubtful, however, whether the act and warrant of confirmation, although

COMPLETION OF TITLE, WHERE BANKRUPT'S RIGHT PERSONAL.

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declared by § 79 equivalent to decree of adjudication in implement of sale, would form a sufficient warrant for charter of adjudication in this particular case, there being no procedure tantamount to a service of the heir. It would probably, therefore, be necessary to have summons of adjudication under the new forms, implying special charge, the decree upon which would form an undoubted warrant.

But, if there is no object in making up titles, as for the exclusion of preferable rights or otherwise, it does not appear to be necessary to do so, excepting as a precautionary course, and in order to make a feudal title in the trustee appear in the register and in the progress; for the 87th section provides, that, without a feudal title, and without the concurrence of the bankrupt, the trustee may grant conveyances with such warrants as the bankrupt could have granted, which shall be as effectual as if granted by the bankrupt himself.

TRUSTEE'S
TITLE, WHERE
BANKRUPT
DEAD.

When the bankrupt is dead, and titles made up in the person of his heir, the trustee may by § 88 petition the Lord Ordinary to have the estate transferred and vested in himself. An abbeviat of this petition, and of the deliverance upon it being recorded, operates as an inhibition, and, if no cause is shewn to the contrary, the estate is transferred by a judgment of the Lord Ordinary as at the date of the sequestration, the effect being the same as is given to the act and warrant of confirmation.

Provision is also made by § 81 for transferring to the trustee estates acquired by the bankrupt after the sequestration.

SALE BY
TRUSTEE.

The sale of the heritable estate, vested in the trustee by one or other of the methods now described, is authorized in various ways suited to different circumstances. The creditors may direct the trustee to sell by public sale, or to institute a judicial sale, and this resolution will be effectual, although there be an heritable creditor with a power of sale, provided that creditor has not taken steps to sell, or, after taking such steps, has unduly delayed. This course, however, will not readily be taken in such circumstances, because the trustee can only sell, when the heritable creditors do not consent, under burden of the securities preferable to his own right. When a public sale is resolved upon, it is made at the upset price fixed by the trustee with consent of the commissioners. He grants a disposition also with their consent to the purchaser, which conveys whatever right is in the trustee, and discharges all securities not preferable to his right, and all diligence not completed at the date of sequestration. Upon the principle of the decision in the case of *The York Buildings Company*, the trustee may not purchase; and, in *Brown v. Burt*, 23d December 1848, a purchase by the trustee's son was held void as being truly for behoof of the trustee himself. The trustee may sell with consent of an heritable creditor having a power of sale; and the conveyance in this case effectually discharges

supra, p. 737.
11 D. 338.

§ 91.

the property of securities preferable to the consenting creditor in so far as they are liquidated, and of the consenting creditor's security, whether it is paid or not, and of all postponed securities. A creditor may sell by virtue of his own power of sale, notwithstanding the sequestration, and the trustee may concur to fortify the title, and he, or any creditor preferable to him, may compel the selling creditor to account for the reversion of the price. When the trustee sells with concurrence of an heritable creditor, that creditor, though thus occupying the position of expositor, may validly purchase in terms of the 99th section of the Statute, which provides generally, that, when any part of a sequestrated estate is sold by virtue of the Act, it shall be lawful for any creditor to purchase; *Cruickshank v. Williams*, 15th February 1849. 11 D. 614.

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We have spoken hitherto of public voluntary sales. If a judicial sale is fixed upon, the trustee institutes the action, which in this case may include either a part of the estate, or the whole of it. The act of sequestration is sufficient proof of bankruptcy. The heritable creditors in possession are alone entitled to be cited, and, when the estate is sold, payment of the residue of the price being made to the trustee after satisfying the preferable securities, the trustee's discharge with the decree of sale frees and disburdens the estate in the same way as a decree in an action of ranking and sale. § 93.

JUDICIAL SALE
BY TRUSTEE.

The heritable creditors are exempted from the expense of the sequestration, and they are only liable for the expense of selling the heritable estate, when the sale is consented to by them. § 94.

4. *Adjudication in Implement*.—This is a process for obtaining the judicial completion of imperfect conveyances, or of obligations to convey, where, from any circumstance, implement of the obligation, or a complete conveyance, cannot be obtained voluntarily. It is by this proceeding that a complete title is obtained, where dispositions have been granted without procuratory or precept, or the purchaser's right stands upon minutes of sale only, or in loans, where there is an obligation to give heritable security, or the bond granted is insufficient. It is used also to transfer entailed estates, when the next heir obtains a right through the succession of the heir in possession to another estate; and, when there is no heir, an imperfect conveyance is made effectual by adjudication in implement directed against the Crown as *ultimus hæres*.

PURPOSE OF AD-
JUDICATION IN
IMPLEMENT.

The process was formerly incompetent, until the holder of the imperfect conveyance had obtained decree and letters of horning against the granter; but the action may now proceed without such steps. Lord CAMPBELL, in the case of *Lumsden v. Lumsden*, states, that a decree and charge are necessary, where the action proceeds upon a verbal bargain validated by *rei interventus*, before the summons of a 2 Bell's App. 104.

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Inst. ii. 12, 50.

1. ADJUDICATION IN IMPLEMENT AGAINST GRANTER OF OBLIGATION.

iii. 426.

12 D. 818.

DECREE AND WARRANT OF INFESTMENT.

COMPLETION OF TITLE.

8 D. 1098.

2. ADJUDICATION IN IMPLEMENT, WHERE GRANTER OF OBLIGATION DEAD.

PROCEDURE BEFORE LANDS TRANSFERENCE ACT.

adjudication in implement can be instituted. But that does not appear consistent with the doctrine delivered by Erskine.

In order to a clear exposition of the nature of the proceeding, we shall take, first, the case of an action of adjudication in implement directed against the granter of the obligation or imperfect conveyance. In the Juridical Styles, we have the form of a summons, the ground of action being a minute of sale. The terms of the minute are narrated, and that it has not been implemented. Whatever may be the ground of this action, it must be accurately set forth. In *Wilkie or Smith v. Flowerdew*, 5th March 1850, a decree of adjudication was found totally null, in consequence of error in reciting the date of an assignation upon which it proceeded. The conclusions are, that the lands should be adjudged from the defender, and declared to belong to the pursuer, heritably and irredeemably, in implement of the obligations in the minute—that the pursuer and his heirs, &c. should be ordained to be infest to be holden *a me*, and horning against superiors directed for that purpose—that the defender be ordained to disburden the lands of encumbrances, and free the purchaser of public burdens, &c.—and that the titles should be produced and delivered. Decree in terms of these conclusions enabled the pursuer to resort to the superior for a charter of adjudication, and his title was completed by infestment. By the 19th section of the Lands Transference Act, decrees of adjudication in implement, as well as of sale, are to contain warrant of infestment *a me vel de me*, and the adjudger may complete his title either by resorting to the superior for an entry, or by infesting and holding base of the party adjudged from, until confirmation. This is a good title, although subinfeudation be prohibited. It has been assumed, that the granter of the minute of sale was infest. If he was not, then the decree transfers to the purchaser his personal right, by means of which he may procure himself infest upon the warrant of the defender's author.

When it is necessary for an adjudger in implement to ask an entry of the superior, it is an unsettled point, whether, like the creditor in an adjudication for debt, he is entitled to obtain a charter without production of the debtor's titles; *Alexander v. Redfearn*, 25th June 1841.

When the granter of the imperfect conveyance is dead, judicial implement of his obligation is obtained by proceeding against his heir. Material changes in this procedure have been made by the Lands Transference Act; but, in order to understand its enactments, as well as for preparation to examine a progress containing an adjudication in implement according to the previous forms, it is necessary to understand the old procedure.

The first step was to fix upon the heir liability for his ancestor's obligation. This was done, in terms of the Act 1540, cap. 106, by

letters of general charge, by which the heir was charged to enter himself as heir to his ancestor, in order that the same recourse might be had against him which would have been competent against the ancestor, if alive, with certification, that, if he should fail to enter, that should not prevent the charger's remedy. The effect of the general charge was *fictione juris* the same as that of a general service, viz, to establish in the heir a representation of the ancestor, and consequent liability to implement his obligation. The representation being thus created, the next step was to constitute the debt against the heir by a summons of constitution, founded upon the imperfect conveyance and the general charge, and concluding, that the heir shall be ordained to make up titles in his own person, and dispoñe the lands to the pursuer. There is also a conclusion for expenses, if the heir should appear and oppose; but it is a general rule, that a party must himself bear the expense of constituting a debt against the heir. If the heir did not appear in the action of constitution, decree passed against him of course, subjecting him in performance of the ancestor's obligation as lawfully charged to enter heir; and that was an effectual constitution of the obligation against him, as liable *passivè* to implement it.

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GENERAL
CHARGE.SUMMONS OF
CONSTITUTION
AGAINST HEIR.DECREE OF CON-
STITUTION IN
ABSENCE.

The next step was to establish in the heir a fictitious title which should in the eye of the law be regarded as equivalent to the service by which an heir's title is made up to his ancestor's estate. To lands, in which the ancestor was infeft, the heir enters by special service. After the decree of constitution he was served with letters of special charge, narrating the imperfect conveyance, the general charge, and the decree of constitution, and charging him to enter heir in special, with certification, that, upon his failure, the complainer should have adjudication and other diligence against him as charged to enter in special.

SPECIAL
CHARGE.

If the ancestor was not infeft, then the fictitious title was created by letters of general special charge as equivalent to a general service, whereby personal rights to lands are transmitted. These second charges were upon twenty days, after which the summons of adjudication in implement was instituted, founding upon the whole previous procedure, and concluding, that the lands should be adjudged from the heir as charged to enter, and representing his ancestor upon the passive titles, and should be ordained to belong to the pursuer in implement of the minute of sale or other obligation. There is a conclusion also for infestment, and horning against the superior, and for production and delivery of the titles.

GENERAL SPE-
CIAL CHARGE.SUMMONS OF
ADJUDICATION
IN IMPLEMENT.

Those were the steps in the event of the heir making no appearance. He might appear, however, in the action of constitution, and renounce the succession. If he did so, then there could be no decerniture against him, nor any charge to establish in his person a title to

PROCEDURE,
WHERE HEIR
APPEARED AND
RENOUNCED.

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DECREE OF CONSTITUTION *cognitionis causâ*.

the lands, which he had renounced. Instead of a decree against the heir, therefore, there was pronounced in the action of constitution a decree against the *hæreditas jacens* of the deceased, which was thus made liable to the pursuer's diligence. This was called a decree *cognitionis causâ*, the effect of it being to ascertain the amount of the deceased party's debt or obligation, for which his lands might be adjudged.

ADJUDICATION IN IMPLEMENT *contra hæreditatem jacentem*.

Having obtained decree *cognitionis causâ*, the purchaser instituted summons of adjudication in implement *contra hæreditatem jacentem*, founding upon the general charge and decree of constitution, and concluding, that the lands should be adjudged to the pursuer, with decree for his infestment, and for horning against superiors.

Decree pronounced upon the action of adjudication in either of the forms now specified, enabled the pursuer to obtain an entry from the superior with infestment, which effectually vested him in the property.

PROCEDURE AGAINST HEIR UPON HIS OWN OBLIGATION.

The same mode of procedure was competent when the heir himself was the debtor or obligant, in order to transfer to the party holding his obligation the heritable property to which the heir had made up no title; but with this exception, that, in this case, the heir being himself debtor, there was no room for a general charge, and no occasion for an action of constitution; but, in every other respect, the steps were the same.

CHARGES ABOLISHED BY 10 & 11 VICT. C. 48.

Important alterations have been made on this matter by 10 & 11 Vict. cap. 48, which, in the 6th section, declares it no longer competent to use letters of general, or special, or general special charge. In the action of constitution, the citation upon, and execution of, the summons, are declared equivalent to a general charge with *inducias* expiring at the same date as the *inducias* of the summons, which must be a date beyond the date of the expiration of the *annus deliberandi*; *Mackintosh v. Macqueen*, 9th July 1829. The execution of the summons is to infer the same certification as the general charge did; and there may be the same procedure and decree. By the same enactment, in a process of adjudication following upon a decree of constitution, or directed against an heir upon his own debt or obligation, a special charge, or general special charge, as the case may require, is to be implied in the execution of the summons, the *inducias* expiring at the same time, and with the same certification inferred; and the subsequent procedure and decree are to be the same as heretofore.

CONSTITUTION AND ADJUDICATION COMBINED.

The actions of constitution and adjudication may be combined, when it is anticipated that the heir will renounce; and, in this case, it is provided by the same clause of the Lands Transference Act, that the sentences of constitution and adjudication may be contained in the same interlocutor, and in the same extract. This facility, how-

7 S. 882.

ever, is only available when the heir renounces, as anticipated. If he does not renounce, there must be that which is now equivalent to a special or general special charge, viz., the execution of a summons of adjudication. When in a combined action of constitution and adjudication, therefore, the heir does not renounce, there must be a separate summons of adjudication; *Browns v. Wood*, 28th January 1851. PART III.
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After decree is pronounced, an abbreviate of its contents is signed by the extractor and recorded in the register of abbreviates of adjudication within sixty days, as directed by the Act 1661, cap. 31. This is necessary, if the superior is to be applied to; but, as the Act in its conclusion reserves the effect of farther diligence by infeftment or charges according to their priority *prout de jure*, the failure to record an abbreviate does not deprive the adjudication first followed by infeftment of its right of preference; *Charteris v. Young*, 2d February 1714. An error in the record of the abbreviate may be corrected by the authority of the Court; *Steven*, 14th June 1848. ABBREVIATE.
1661, c. 31.
5 Br. Supp.
102.
10 D. 1287.

The observations already made in regard to completing the title of the purchaser in an action of sale also apply here, the decree now containing, in terms of the Lands Transference Act, a warrant of infeftment by alternative methods of holding.*

There is no room in the adjudication in implement for a legal reversion, the transference by means of this process being absolute and irredeemable. Neither can there be place for a *pari passu* preference, as there is under the statutory provisions with regard to adjudications for debt. The party who first obtained decree of adjudication in implement was held to exclude another party craving adjudication of the same subject, although they came into Court together, and the cases appeared in the roll of the same day; *Wright v. Murray*, 29th June 1821. The preference is, of course, secured by the party, who first obtains an effectual infeftment, either by the use of the personal right of the defender, or by sasine upon the decree holding base of the defender, or upon a charter obtained from the superior. In *Sinclair v. Sinclair*, 21st June 1704, the preference COMPETITIONS
IN ADJUDICA-
TIONS IN IMPLE-
MENT.
1 S. 92.
M. 56.

* In *Liddle v. Thomson*, 17th November 1855, an adjudication in implement was defended, and the question arose, whether, when the heir was unentered, the decree of adjudication could competently contain a warrant to infest in terms of the Lands Transference Act, § 19. This authorizes the Court of Session, in all cases when pronouncing decree of adjudication, to grant warrant for infesting the adjudger; and then it proceeds to provide, that, where "the party adjudged from" is entered with the superior, or is in a situation to charge the superior to grant entry by confirmation, the adjudger may complete his title by taking infeftment in virtue of the warrant on the decree. The Court held, that the decree of adjudication here might competently contain a warrant to infest, but that such warrant was entirely at the risk of the person asking it; and they refused to express any opinion, whether in this case, or in all cases, the party might safely take the warrant, and under what circumstances he might or might not act upon it. 18 D. 61.

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5 D. 888.

was given to a second adjudication, the superior having been first charged upon it, which is equivalent to an infeftment. The superior cannot avail himself of his position to defeat the priority of another party. In *Macgregor, &c. v. Macdonald, &c.*, 9th March 1843, a preference was refused to a first charter and infeftment, because granted by superiors in favour of themselves, after having some months before refused a charter to a competitor.

IV. TRANSMISSION OF HERITABLE RIGHTS FROM THE DEAD TO THE LIVING.

1. *Service.*

RIGHTS TRANS-
MITTING *ipso*
jure.

There are certain rights which are transmitted *ipso jure*, without any judicial form or process, immediately upon the death of the proprietor to his heir. Of these rights the most important are leases, in which the rule *mortuus sasi vivum*—otherwise a stranger to our law—has place. Titles and offices of dignity also are transmitted *jure sanguinis*, and, along with heirship moveables, need no formal transference. The *jus crediti* bestowed upon the heir by a marriage contract passes into his person without service, in so far as regards the right to sue for implement of the obligation, because, with respect to the obligation, he is a creditor, and not an heir; *Finlayson v. Finlayson*, 9th December 1760; *Ogilvy v. Ogilvy, &c.*, 16th December 1817. But, if the obligation had been implemented by securing the provision, it is thereby converted into a right which must be taken by service. The substitute in a moveable bond named immediately after the creditor does not require service; *Wilson v. Sellers*, 6th July 1757. And this rule applies to heritable bonds not completed by sasine. But a substitute who is called *nominatim* second after the creditor requires service to prove the failure of those named before him. Service is also necessary to transmit bonds taken in favour of heirs secluding executors, or in favour of heirs-male. Furniture destined in an entail along with lands is transmitted by possession without service; *Veitch v. Young*, 25th May 1808.

M. voce "Ser-
vice and Con-
firmation,"
App^s. No. 4.

With regard to heritable rights, from what has already been stated on the subject of transmission *intuitu mortis*, it is evident, that, wherever a conveyance has been executed to take effect at the granter's death, there is no need of any judicial inquiry to transmit his property, since he has already by his own act *per verba de presenti* transferred it to a disponent named by himself, and this disposition, as it bears the form, so it receives the effect, of a conveyance *inter vivos*.

SERVICE.

But, when there is no conveyance from the party last vested, a judicial inquiry is indispensable, to ascertain who is entitled to the character of his heir, because the fee of lands cannot under any cir-

cumstances be transmitted without writing. This principle is so strong, that one even who is substituted *nominatim* in a disposition or entail cannot be vested in the property after the death of a prior member by the force of the destination, but must have the estate conveyed by service out of his *hæreditas jacens* into his own person. The principle holds also, whether the ancestor's right was feudally complete or merely personal, the judicial transmission by service being equally necessary in both cases; *Livingston v. Lord Napier*, M. 15,409; 9th March 1757. This was a conveyance by the Countess of Findlater in favour of herself and her husband in conjunct fee and liferent for his liferent allenary, and to James Livingstone. Upon the death of the Countess, James Livingstone took infestment without service; but it was held, that the deceased Countess was not thereby divested. By the terms of the disposition, the fee was taken in the first place to the Countess herself, and James Livingstone was an heir substitute. The fee, therefore, being in the *hæreditas* of the Countess, could only be transferred by service. In *Gordon v. M'Culloch*, 24th February 1791, the destination of entail was to myself, and to David, my son; the entailer being here also still the fiar, and David a substitute, the latter could not take the succession without service.

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CHAPTER III.
SERVICE NECESSARY, WHERE SUBSTITUTION.

M. 15,409;
2 Ross, L.C.
511, 521.

Bell's 8vo
Cases, 180.

The fee, then, whether under a feudal right or a personal right having been vested in the deceased—Who is entitled to be served upon his death? The answer is, the nearest heir existing, none nearer being either born or *in utero* at the time of service; *Lord Mountstuart v. Lady Mackenzie*, (various dates, 1707 to 1710.) When subsequently a nearer heir appears, the one served must divest himself in his favour, and will be reckoned a trustee for him during the period of his possession; but *bonâ fide* contractions during the possession are effectual against the heir, as, for example, the jointure in an antenuptial contract of marriage; *Macdonald v. Mackinnon*, 15th February 1765, affirmed on appeal 25th February 1771.

WHO ENTITLED
TO SERVE?

M. 14,903.

M. 5290.

In serving an heir, the first thing to be ascertained is, who was last vest in the fee. If the deceased possessed upon a feudal or personal title not limited, it is clear that he was the fiar, and the estate being in his *hæreditas jacens*, it must be taken out of it by a service adapted to the state of his title, according to the rules which we shall presently explain. But the course is less clear, when the title is not thus simple, but bestows rights upon more than one party; and here we are carefully to distinguish the rights of those who are called, and the effect produced upon the title of the disponent by the terms in which he calls them.

SERVICE MUST
BE TO LAST
FIAR.

When the granter of a disposition does not disponent to himself in the first instance, but directly to A., whom failing to B., then if A. (the institute) survive the disponent, and possess without making up a

SERVICE,
WHERE INSTI-
TUTE DIES,
AFTER POSSESS-
ING UPON A
PERSONAL TITLE.

PART III. title, how shall B. proceed upon the death of A. ? Where is the fee?

CHAPTER III.

Inst. iii. 8, 73.

M. 14,369 ;
2 Ross, L. C.
563, 568, 600.

2 S. 678.

It may be that the feudal right remained in the disponent, but the personal right of fee was transmitted by the disposition to A., the institute, who died, therefore, vested in the fee. Thus, a service by B. to the disponent would be inept. He must serve as heir to A., who had the personal right. This is the rule delivered by Mr. Erskine, and it is illustrated in *Hay v. Hay*, 30th June 1758. Here, a father conveyed his estate in his son's marriage contract to the son *nomination*, and the heirs-male of the son by that or any other marriage, whom failing to the granter himself. The disponent having died without male issue, the property reverted in terms of the destination to the father, who entered without making up any title, but it was found that he ought to have had a general service. In *Dennistoun v. Crichton*, 5th February 1824, a proprietrix disposed to herself in liferent, and to A. in fee, whom failing to a series of substitutes. One of these substitutes having served heir to the granter of the disposition, the title was found inept, inasmuch as she was liferenter merely, and the service ought to have connected the party served with a disponent who survived her, and possessed on the personal right as fiar.

WHEN FIRST
SUBSTITUTE IS
CALLED AFTER
GRANTER'S
HEIRS.

M. 14,366.

M. 14,368.

4 S. 742 ;
3 Ross, L. C.
53.

But, when the first substitute is only called after heirs of the granter's body, then his heirs being first called, the fee is held still to remain with the granter, and the destination is to be taken, as if he had first instituted himself. The fee thus remaining with the granter, the service of the institute or any substitute must be to him ; *Creditors of Carlton v. Gordon*, 8th February 1748. (Lord KILKERRAN's report states the facts correctly.) The case of *Peacock v. Glen*, 22d June 1826, is to the same effect. The disposition was to heirs of the granter's body of his present or any future marriage in fee, whom failing to William Beattie. There were no heirs. William Beattie took infeftment on the disposition without service, and granted a security for £1000. He afterwards became bankrupt, and the assignees for behoof of his creditors made up titles by adjudication upon charges to Beattie to enter heir, whereby he was *fictione juris* connected with the granter of the disposition under a passive title. The assignees then challenged the security, which was reduced upon the grounds that the conveyance, being taken first to heirs of the granter's body, the fee remained in him, and that a service was also necessary, inasmuch as without it the notary who gave infeftment to William Beattie had no evidence of the failure of heirs, and that the sasine was inept under the Act 1693 without specifying the service.

PROCEDURE,
WHERE INSTI-
TUTE PRE-
DECEASES TES-
TATOR.

Much difference of opinion has prevailed with regard to the proper form of procedure, where the institute first called dies before the testator, the questions being—(1.) Whether, the deed remaining undelivered, any right vests in the institute during the testator's life ;

and (2.), If no right vests in a predeceasing institute, then how are the parties called after him to make up their titles? They cannot serve to the institute, if no right vested in him, nor can they serve to the testator, if he disposed the fee. Are the substitutes then conditional institutes? and, if so, what is necessary to establish that character, and to complete this right? These questions occurred in the case of *Colquhoun v. Colquhoun*, 8th July 1831; and the opinions of the Court were given upon a remit from the House of Lords, and it was decided by the judgment of the majority, opposed to the unanimous opinion of the First Division, that a service to the entailer in such circumstances is inept, and gives the party served no right to the procuratory or precept—that the institute having predeceased the granter, no right had vested in him—and that the surviving party next called after the institute was a conditional institute, and should make up his title by obtaining a decree of declarator, that the first institute had failed, and that he was entitled as conditional institute to use the procuratory and precept—farther, that if the conditional institute should die without expeding a title, the next substitute should have it judicially declared who was the conditional institute that survived the testator, and serve heir to such conditional institute. The decision in *Murray v. Murray*, 21st May 1833, was inconsistent with that of *Colquhoun*, inasmuch as service was found to have been effectually expedite to a party called as institute who had predeceased the testator. The principles recognised in these two decisions were in some respects repudiated in a subsequent case, which underwent very full and careful investigation; *Fogo v. Fogo*, 25th February 1840; House of Lords, 18th August 1843. Here, the testator disposed to A. and his heirs, whom failing to B. and her heirs, whom failing to C. A. and B., the institute and first substitute, predeceased the testator. C., the party third called, served heir to A. the institute, and made up a title upon that service. It was found by the opinion of the majority of the Judges, and confirmed by that of the Lord Chancellor, that, upon the death of the testatrix, the right to the lands vested in C. by the predecease of the institute and first substitute; and it would, therefore, appear, although not expressly decided, that her service to the first institute was unnecessary. But it was agreed here, that there is no sufficient authority or principle to justify proceeding by declarator in such a case. That portion of the decision in the case of *Colquhoun* is no longer, therefore, of any authority; and, although a declarator for the purpose of proving the fact in such circumstances cannot be objected to, it can no longer be regarded as a step of conveyancing in transmitting the right of a deceased party to his successor.

Having ascertained who was last vest in the fee, it is next neces-

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HEIR MUST
SERVE IN PRO-
PER CHARACTER.

B. iii. T. 8.

Inst. iii. 8, 74.

M. 14,015;
2 Ross, L. C.
522, 548, 596,
599.

3 S. 476.

M. 14,448;
2 Ross, L. C.
564.M. 14,016;
2 Ross, L. C.
549.M. 14,369;
2 Ross, L. C.
563, 568, 600.10 & 11 Vict.
c. 47, § 4.

sary to determine the proper character in which the next heir is to be served. Where there is no destination in force, whereby the rule of legal succession is controlled, the service of the claimant as next and lawful heir will carry to him the right of all subjects descending by law to the heir of line. We do not here enter upon the rules of succession, as that subject belongs to the chair of Municipal Law.

The rules are contained in Mr. Erskine's Institutes. But service as next and lawful heir or heir of line does not carry subjects settled by special destination, although the party served may be entitled to take these under the destination. The service of an heir claiming under a destination must be in the character of heir of provision, because one may be heir of line, although not entitled by the destination; and, to establish the character of heir of provision, it must be proved that the previous members of the destination have failed. The case will be found very specially put by Mr. Erskine. The rule is illustrated in the case of *Edgar v. Maxwell*, 21st July 1738, where an heir, called under a destination of heirs-male of a second marriage, having served as heir-male in general, the estate was found to be not thereby transmitted. The service should have been as heir-male of provision. In *Woodmass v. Hislop's Trustees*, 28th January 1825, the substitute in an heritable bond served as nearest lawful heir of the institute. This was found to be inept, and the debtor was decerned to pay to a subsequent heir served as heir of provision in general to the institute, the fee not having been taken up by the previous service. But, where the character in the service necessarily implied that of the investiture, it was sustained as sufficient; *Haldane v. Haldanes*, 27th November 1766. The destination here was to Patrick, and the heirs-male of his body. The heir was served "*tanquam legitimus et propinquior hæres Patricii, ejus patris*;" and that was sustained as proving that the claimant was heir-male. Where one is erroneously served heir of provision instead of heir of line, that is not held to invalidate the service, provided there appear upon the face of it evidence that the party possesses both characters; *Bell v. Carruthers*, 21st June 1749.

In the service of heirs of provision it has always been considered proper to set forth specially the deed containing the party's right, in order to make certain the failure of the prior substitutes. But this was not formerly reckoned indispensable, as was found in the second branch of the case of *Hay v. Hay*, 30th June 1758, where service as lawful and nearest heir of tailzie and provision was sustained, although not referring to the deed containing the destination. The rule is now, however, rendered imperative by the Service of Heirs Act, 10 & 11 Vict. cap. 47, which requires that in all claims for heirs of provision the deed or deeds shall be distinctly specified.

Services are of two kinds, *General* and *Special*. A general service

confers the character of heir in general, and transmits all rights, excepting those which were perfected by sasine in the person of the ancestor, and which can only, therefore, be transferred by special service. The general service, therefore, carries right to heritable subjects not requiring sasine, as reversions, servitudes, beneficial rights under trusts, reserved burdens on bond, lands secluding executors, heirship moveables, &c.; and also such heritable rights as require, but have not been perfected by, sasine, as, for example, the personal right under dispositions and heritable securitics, whereon no infeftment has followed. A disposition *a me* with a sasine not confirmed is carried as a personal right by general service; *Douglas v. Somervell*, 10th July 1713. Lord IVORY, however, records the opinion of Conveyancers, that, in this case, a good title would be made by a special service or precept of *clare constat* and confirmation. A general service has no effect whatever in vesting the party served with lands in which the ancestor died infeft; *Ker v. Howieson*, 12th February 1708. Here, there was a disposition to the father in liferent, and to William, his son, in fee, whom failing, to Richard in fee. Infeftment passed in favour of all these parties for their respective rights. On the death of William, Richard served heir in general to him. His title was found inept, and a dispositive of Richard was dispossessed by the next heir of William serving under a special service. This decision shows that there cannot be two fiars with successive rights infeft at once. It was, therefore, necessary that Richard, his original infeftment being inept, should serve to William, but William having been effectually infeft the fee could only be transferred to his heir by special service. Where infeftment has followed upon an heritable security, a general service is ineffectual to carry even the personal obligation contained in it; *Lord Halkerton, v. Drummond*, January 1729. Of the transmission of heritable rights not requiring sasine by general service there is an example in *Cuthbertson v. Barr, &c.*, 7th March 1806, where the price of heritable property created a real burden was found to be effectually carried by general service.

Special service is used, and is necessary, to transmit to the heir all the subjects in which the ancestor was infeft.

The mode of expeding services was entirely altered in 1847; but it is still necessary to understand the former practice, in order to test the accuracy of titles prepared under it. The claimant purchased from Chancery a brief which was a mandate from the Sovereign directing a Judge to ascertain the validity of the claimant's title by an inquest or jury of inquiry. The inquiry could not proceed until fifteen days after the brief had been proclaimed in the jurisdiction where the service was to proceed. The jury consisted of an odd number of fluctuating amount, there being no certain rule, although latterly by

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CHAPTER III.
THE GENERAL
SERVICE.

M. 3008;
2 Ross, L. C.
135, 576.

M. 14,357;
2 Ross, L. C.
25.

M. 14,436.

M. voce "Ser-
vice and Con-
firmation,"
App^r. No. 2.

SPECIAL SER-
VICE.

1. OLD FORM OF
EXPEDING
SERVICES.

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practice the number was generally fifteen. The brief for a general service might be directed to any Judge Ordinary. For a special service, it was addressed to the Sheriff of the county where the lands lay, or to the Sheriff-depute or substitute of Edinburgh, as coming in place of the macers, who formerly exercised judicial functions in the service of heirs.

HEADS OF IN-
QUIRY IN
BRIEVES.

The brief contained seven heads of inquiry, of which the two first only required to be answered in the general service. These were:—

1. Whether the deceased died at the faith and peace of the King. The death did not require to be proved, that being a public fact, unless it took place abroad, in which case it was established by the evidence of the magistrates of the place where it occurred. The jury was required to find, whether the deceased died at the faith and peace of the King, because, if he was a rebel, the claimant could not be served, the estate being forfeited to the Crown. 2. The second head was, whether the claimant was the next heir in whatever character might be specified in the claim. It was necessary to set forth the degrees of propinquity, and, in *Earl of Cassillis v. Earl of Wigton*, 22d July 1629, a service was set aside, because every link was not specified. This objection, however, is not available to a party, whose degree is more remote than that of the claimant; *How v. Bryden*, 9th March 1822. Any degree, however remote, excludes the claim of the Crown as last heir. When the propinquity is recent, it may be proved by witnesses—if it involves a remote inquiry, by documents. In a special service the claimant was required to prove that the ancestor died infest, of which the evidence was charter and sasine, or consecutive sasines for forty years, if there was no charter—also the date of the death, in order to show how long the lands had been in non-entry. 3. The third head was, whether the claimant were of lawful age. This referred to the period when the superior of ward lands could not be forced to enter a vassal of imperfect age. Afterwards it was invariably answered in the affirmative, whatever might be the claimant's age. 4. The fourth head demanded the old and new extent of the lands, in order to ascertain the extent of the casualties. The old was proved by former retours, and the new valuation by the county cess-books. 5. The fifth head inquired of whom the lands hold. This was shown by the titles, and these also furnished the answer to the sixth head. 6. This head required the duties to be specified, the casualties being different according to the nature of the duties. If none were specified, the holding was of old presumed to be ward. Now a Crown holding would be held to be blench, and one held of a subject to be feu. 7. The last head was, in whose hands the lands now are. This enabled the claimant to obtain exemption from the duties of non-entry, if the lands were subject to terce or courtesy. But this head was not in practice answered.

M. 14,423.

1 S. 393.

The service proceeded upon a claim, in which the party answered the different heads of the brief, and he produced his proof to the jury, any of whom might competently bear evidence in the case. If the jury were satisfied, they returned a unanimous verdict, finding the claim instructed and proven, and serving the claimant heir in terms of the claim. To this verdict it was necessary that the Judge should interpose his authority. The verdict also ordained the service and brief to be retoured (or returned) to Chancery, an extract from which called the *Retour* is the claimant's evidence of the service. Before 1550 the principal service was held of itself complete evidence, but since that date no service has been esteemed complete, unless retoured ; *M'Intosh v. M'Intosh*, 2d February 1698.

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PROCEDURE
BEFORE THE
JURY.
VERDICT.
RETOUR.

M. 14,431.

By the Statute already referred to brieves of service were abolished after 15th November 1847, and a petition to the Sheriff substituted, which, in the case of a general service, may either be to the Sheriff of the county of the deceased's domicile, or to the Sheriff of Chancery, a new officer created by the Act to exercise the same jurisdiction in services, as was formerly exercised by any Sheriff or Judge Ordinary. Where the deceased had no domicile in Scotland, the petition must be to the Sheriff of Chancery. When the service is special, it may be either to the Sheriff of the county where the lands lie, or to the Sheriff of Chancery, but to the latter alone when they are in different counties.

2. NEW FORMS
IN SERVICES
UNDER 10 & 11
VICT. c. 47.
§§ 1, 2, 3.
§ 27.

The petition, which must be signed by the claimant, or a mandatory specially authorized, is to be in the form appended to the Statute, and to contain the same particulars as before, excepting those points in all the heads but the second which relate to the peculiarities of the ancient feudal holding. The date of the ancestor's death must be stated. In services under entails, the prohibitions and clauses irritant and resolute may be omitted, a reference to them in specified terms as already recorded in the register of tailzies or sasines being declared equivalent to insertion. There is a similar provision with respect to real burdens, and all other conditions or limitations. The seventh section of the Act directs publication ; and the petition, thus presented and published, is declared to have the same effect as a brief and claim. The Sheriff may then take evidence himself, or by commission. The propinquity of the claimant may competently be proved by the evidence of the law agent in the service ; *Boyle*, 24th February 1853. (Outer House.) Upon considering the proof, the Sheriff may serve the petitioner in whole or part, or refuse to serve him, his judgment being equivalent to the verdict of the jury under the inquest. The proceedings are then to be transmitted to Chancery, the judgment recorded, and an authenticated extract delivered to the party through the sheriff-clerk. When error in *essentialibus* occurs in the decree of service and in the books of Chancery, it must be cor-

PETITION OF
SERVICE.

§ 4.

§ 6.

§ 9.

§ 10.

15 D. 432.

DECREE OF
SERVICE.
§ 12.

- PART III.** rected by the Judge in the service, and not by the Court of Session ;
CHAPTER III. *Farquhar*, 23d December 1853. The proceedings before and after
 16 D. 312. the transmission are patent to the public, and the extract decree of
 § 13. service is to have the full legal effect of a retour, and is challengeable
 only by reduction as in a retoured service.
- WHO MAY** No one is allowed to oppose who could not formerly appear and
OPPOSE SERVICE. oppose a service before an inquest, and the objections, which must be
 in writing, are to be summarily disposed of by the Sheriff. The
 ancient mode of procedure in a competition of brieves will be found
 3 Br. Supp. in *Thomson v. Spencerfield*, 8th June 1680. No one could formerly
 376. oppose a general service excepting a party claiming to be heir, and
 1 S. 91. producing a competing brief; *Cochrane v. Ramsay*, 28th June 1821.
 In a special service, the object of which is to obtain a title to a parti-
 cular subject, any one having an interest in that subject was entitled
 to appear and be heard; *Innes v. Ker*, 23d June 1807. But this
 liberty has generally been limited to persons either infeft in the lands,
 or having a personal right to them; and the general rule has been
 applied by the Court under the recent Statute to a claim of special
 service; *Graham v. Graham*, 23d November 1850, where, overruling
 a decision of the Sheriff of Chancery, it was held, that, in order to
 oppose a service, the objector must take out a competing brief, and
 that it is not sufficient to allege merely that he has an interest. In
 the case of *Cochrane v. Ramsay*, 29th April 1830, a general service to
 an ancestor was held to be incompetent where there had been a prior
 general service by another party to the same ancestor. Notwithstanding
 that decision, however, it has been held competent to expedite a
 second service in the person of one claiming to be the true heir, in
 order to challenge and set aside a previous service of one who is not
 the heir; *Macara v. Wilson*, 15th February 1848. But the nullity
 of a second service to convey what has already been conveyed by the
 first, has again been held in *Wilson v. Gilchrist's Trustees*, 11th Feb-
 ruary 1851.
- § 8. An intending competitor, by lodging a caveat with the clerks of
 Chancery, or of the Sheriff-court, is entitled to receive notice of the
 petition when lodged; and he may then present a petition to be pro-
 ceeded with in the same way as the other, in which the Sheriff may
 § 17. sist procedure, that the proof and judgment in both cases may pro-
 ceed together. But, if a party prefers to have his case tried by a jury,
 he may advocate for that purpose before the evidence begins, and
 after the verdict, the Court remits to the Sheriff to give judgment in
 terms of it. The Sheriff's judgment may also be advocated for review
 § 18. within a short fixed time, and it may be brought under review like-
 wise by reduction.

**EFFECT OF
SERVICE.**

From the nature of the special service, as carrying only particular

subjects, it follows that a general service cannot include, or carry with it, the effect of a special service. An heir of provision may be served in that character in general, and such a service will transmit to him rights specially destined, which do not require, or have not been completed by, infestment; but service as heir of provision in general transmits no right completed by infestment. The doctrine, therefore, that general service does not include special is without exception, saving only the case of Crown charters, to be afterwards noticed.

General service imports a universal representation, and the heir, therefore, though he receive nothing by it, is liable for all the ancestor's debts.

A special service, on the other hand, implies a general service in the same character, and so service of an heir of line to a particular estate carries not only the property embraced in the service, but all personal rights likewise which descend to the heir of line. The special service had also, until lately, this serious effect, that it subjected the heir to all the burdens to which he would have been liable if served heir of line in general; *Drummond*, February 1676. This rule is now altered, however, the Service of Heirs Act having provided, that no special service shall imply a general service except as to the property embraced in it, and that it shall infer only a limited passive representation to the extent of the value of the property carried by it.

There is this marked distinction between the effect of general and special services, that the one is a complete transmission, and the other is not. If an heir served in general shall die without being infested upon a procuratory or precept to which the service gives him right, the personal title has, nevertheless, been effectually transmitted to him, and the next heir, in order to obtain right to it, must serve to him as last vested in the personal fee. On the other hand, a special service vanishes if not followed by infestment,* and a subsequent heir, therefore, must serve, not to the heir last served, but to the heir last vested. The personal nature of the special service is distinctly preserved by the Service of Heirs Act, which declares it not to be transmissible so as to infest the heir or assignee of the person served. Although the special service does not now imply a general one, an heir of line, or heir-male, by the new Act may petition for, and obtain, a general service along with the special.

The utility of the special service is greatly increased by provisions contained in the Statute for making it not only a writ of transmission, but a warrant of infestment. By § 21 it is provided, that, for completing the feudal title of the heir served, but of him only, the decree of special service shall contain a precept of sasine, and the extract shall have the legal effect of a disposition by the party deceased last

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CHAPTER III.
GENERAL SERVICE DOES NOT INCLUDE SPECIAL.

Ersk. Inst. iii. 8, 50.

SPECIAL SERVICE IMPLIES A GENERAL SERVICE TO THE PROPERTY EMBRACED IN IT.

M. 14,457.

§ 23.

GENERAL SERVICE OPERATES A COMPLETE TRANSMISSION.

SPECIAL SERVICE FALLS IF NOT FOLLOWED BY INFESTMENT.

§ 21.

§ 24.

SPECIAL SERVICE NOW BEARS WARRANT TO INFEST.

* See *infra*, note p. 760.

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CHAPTER III.
SERVICE OF
HEIRS, *contd.*

infest in favour of the heir served, with obligation to infest, assignation of writs, and rents, and precept of sasine.* Upon this infestment may pass, but only in favour of the party served, by the form prescribed by the Act, and this infestment, with the decree, is declared to be an effectual investiture, holding base of the deceased and his heirs until confirmation; and that, notwithstanding any prohibition of subinfeudation or alternative holdings. The right of the superior is reserved to require the heir forthwith to enter, and to deal with him otherwise as unentered. The nonage or insanity of the deceased party served to is declared not to prevent the effect of the service as a disposition from him to the heir served. It is carefully to be noted, that the decree of service and warrant of infestment will not serve as a warrant of resignation, the effect of the *a me* holding in the obligation to infest being expressly restricted to confirmation only.

ENTRY *CUM* *beneficio*; 1695,
c. 24.

Entry CUM BENEFICIO INVENTARII.—By the 1695, cap. 24, apparent heirs were allowed, before entering, to give up an inventory of the ancestor's estate, and to have their responsibility for his debts restricted to the value of the inventory. It required to be given up upon oath, and to contain a particular account of his lands, houses, and other heritable rights. It was signed by the heir and witnesses, and by the Sheriff and Sheriff-clerk, in whose books it was recorded. This required to be done within a year of the ancestor's death, and within forty days thereafter registration was necessary in the record for inventories kept in the books of Council and Session. Any property afterwards discovered might be added to the inventory by an eik within forty days. The benefit of the measure was forfeited by wilful omission, and by intromission farther than was necessary for custody and preservation.

This form of procedure did not obviate the necessity of entering by the regular feudal methods, but it enabled the heir to enter afterwards by service and retour, without incurring a universal representation.

EFFECT OF
10 & 11 VICT.
c. 47, UPON
THIS MODE OF
ENTRY.

This mode of entry is in all probability practically superseded by the provisions made in the recent Statute for limiting the effect of

* A party having died infest in certain lands, the heir obtained decree of special service containing precept of sasine, which was duly extracted and recorded, but he died before infestment was expedited in his favour. The question arose, whether, under the Act 10 & 11 Vict. cap. 47, giving the decree of special service the effect of a disposition, a personal right was not vested in the party who had served, notwithstanding infestment had not followed. The Court was of opinion, that the Statute was not intended to alter the law which required infestment as a condition of vesting, but merely to facilitate the means by which infestment might be obtained; and it was, therefore, held, that, in respect the title under the service was not completed by infestment, the decree of service had not the effect of vesting such a personal right to the subjects contained in it as was transmissible to a disponee of the heir: *Lockhart, &c. (Moreton's Trustees) v. Moreton*, 19th July 1854.

representation by service. We shall notice, therefore, only such points as may be useful either in examining titles, or by their analogous application to the forms which are now observed.

An inventory might competently be made by a *factor loco absentis*; *Paton*, 24th July 1785. It is beneficial to the heir, only if made before service. A general service before inventory subjects to universal representation; *Coddrington v. Johnstone's Trustees*, 11th February 1818, affirmed 31st March 1834; and an heir who had given up an inventory might pursue a judicial sale under the Act 1695, provided he was not entered by service; *Blair*, 27th February 1751. It was competent to the heir to have the value judicially ascertained, sell voluntarily, and pay to the creditor who made the first demand; but, if cited by any one creditor, it was incumbent upon him to bring all the creditors into the field, that the price might be divided according to their rights of preference; *Lawson v. Udny*, 28th November 1738. The proper form of the decree against an heir entered *cum beneficio inventarii* is to decern against him for the debt, reserving his objections to full payment; *Gordon v. Ross*, 22d July 1741. Creditors were not bound by the value attached by witnesses to the property in the inventory, and they might insist upon a sale by auction as the only mode of discovering the true value; *Heirs of Strachan v. His Creditors*, 12th July 1738.

The benefits of entry with a limited responsibility may now be attained by a more simple and less troublesome method, either where the ancestor was infest by special service, which, as we have already seen, now restricts the heir's liability to the value of the subjects; or, when there was no infestment in favour of the deceased, by general service with specification annexed. The Service of Heirs Act, § 25, prescribes the form of the petition craving the effect of the general service to be limited to subjects contained in a subjoined specification. The specification is to be referred to in the Sheriff's judgment, and embodied in the extract decree, which is to infer only a limited passive representation to the extent of the lands in the specification.

We have only, before leaving this Statute, to notice the provision for the annual publication of an abridgment of the record of services, which record is always to be patent, and extracts obtainable upon payment.

We now proceed to examine a writ which forms an exception to the ordinary rule, that the entry of heirs is by public judicial authority.

2. *The precept of* CLARE CONSTAT.

This is an acknowledgment by the superior, which may be granted without service, that the party is the heir; and he, therefore, grants warrant for infesting him. It derives its name from the words in the Latin form containing the superior's declaration, that from authentic

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ENTRY CUM
beneficio—BY
WHOM COMPE-
TENT.
M. 4071.
F. C.
2 Sh. App. 118.

M. 5353.

M. 5348.

M. 5352.

M. 5348.

BENEFITS OF
ENTRY WITH
LIMITED RESPON-
SIBILITY—HOW
NOW OBTAINED.

PRECEPT OF
CLARE CONSTAT.

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M. 14,480 ;
2 Ross, L. C.
265.

documents *it clearly appears*, that the grantee is the heir. The superior's power in granting this writ is strictly construed, and he cannot in this manner enter any one but the heir ; *Finlay v. Morgan*, 20th July 1770. Here, a precept of *clare constat* in favour of the heir in liferent, and his son in fee, was found inept, and a security granted by the son, consequently, void. When the next heir is a distant relation, and it is known that a nearer has existed, there ought to be a service.

EFFECTS OF
PRECEPT OF
clare.

F. C.

1 S. 277.

Inst. iii. 8, 71.

M. 14,003.

M. 11,166.

5 Br. Supp. 926.

14 D. 1041.

M. 15,118 ;
2 Ross, L. C.
287.

M. 15,115 ;
2 Ross, L. C.
280.

Hume, 724 ;
2 Ross, L. C.
288.

PRESCRIPTION
OF SERVICES.

1 Rob. App.
82 ; 3 Ross,
L. C. 583.

10 D. 461 ;
3 Ross, L. C.
595.

PRECEPT OF
clare IS STRICT-
LY PERSONAL TO
HEIR.

This instrument implies a reference to the original investiture, and imports an acknowledgment of the grantee under its conditions. The benefit of the taxation of the entry, therefore, continues, although it may not be noticed in the precept ; *Stewart*, 3d June 1813. At the same time it forms a title of prescription, and was sustained as the valid foundation of a progress, even where it was invalid when taken, the sasine which should have excluded it being held to be reduced by the long prescription ; *Harvey v. Hamilton, &c.*, 29th January 1822. The precept of *clare constat* gives no right to any subject not included in it, and it appears, contrary to the doctrine delivered by Mr. Erskine, that this mode of entry does not subject in a universal representation ; *Farmer v. Elder*, March 1683 ; *Gordon v. Maitland*, 1st December 1757 ; *Roseberry v. Creditors of Viscount Primrose*, 16th July 1766. But one cannot by this mode of entry avoid the burden of debts of an immediate predecessor three years in possession, which by 1695, cap. 24, is laid upon those serving to a remote ancestor. That liability holds equally where the heir enters by precept of *clare*, the Court holding that equivalent to service ; *Brown v. Henderson*, 17th July 1852. Nor does the character of the heir require to be specified with that rigid accuracy which service as an *actus legitimus* requires. In the title by precept of *clare constat*, it is necessary only that the instrument be substantially right ; *Durham's Trustees v. Graham*, 31st January 1798 ; and the immediately preceding case of *Crichton's Creditors v. Christian Knowledge Society*, 16th January 1798. The same rule was again acted upon in *Ogilvy v. Ogilvy*, 5th June 1817.

The precept of *clare constat* may be reduced by a nearer heir any time within forty years, whereas a service prescribes in twenty years by the Act 1617, cap. 13, and cannot afterwards be challenged even by the true heir ; *Neilson v. Cochran's Representatives*, 19th March 1840. The Statute referred to protects heirs of provision, as well as heirs of blood ; *Campbell v. Campbell*, 26th January 1848.

The precept of *clare constat* is strictly personal to the heir, being expressly excepted from the Statute 1693, cap. 35, making warrants valid in favour of heirs after the death of the granter or grantee. Previous to the Lands Transference Act, therefore, infestment could not be taken upon a precept of *clare constat* after the death either of

the superior or of the heir. That Statute, § 15, altered the law so far as to provide, that, notwithstanding the death of the superior, the precept should still remain in force during the grantee's life, so as to infeft him ; but, if he shall die without being infeft, it is void.

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This instrument is not affected by the Service of Heirs Act.

The form will be found exemplified in the Juridical Styles. It is very simple, containing an acknowledgment of the grantee, whose character as heir ought to be correctly set forth, with a *reddendo*, and a warrant for infeftment, which will now, of course, be in the brief form allowed by the Lands Transference Act. Conditions and clauses irritant and resolute of entails, as well as limitations and burdens in other rights, do not require to be inserted, but the effect of insertion is produced by reference in the manner and under the various authorities already referred to. Such other alterations as may be requisite in entries granted by over superiors, under the operation of the provisions contained in the Lands Transference Act for obtaining entry from superiors, will appear from the observations to be made when we come to treat of the entry by the superior.

FORM OF PRE-
CEPT OF *clars*.

3. *The title by adjudication on a trust bond.*

There is one other mode of expeding titles, resorted to by an heir who has been anticipated by the service of another, or who is from any cause desirous to try the validity of his claim without entering by the feudal methods already described. The mode referred to consists in a trust bond and adjudication.

This is called a tentative title, having been adopted when the heir was uncertain as to the strength of his own claim or the position of his ancestor's affairs, and apprehended danger from a regular entry. He grants a bond for the full value of the estate to a trustee, who returns an acknowledgment or back-bond explaining the purpose, and the trustee proceeds to adjudge the lands for the debt. The adjudication proceeds upon a charge to the heir to enter, according to the form and principles already explained. By the charge the heir does *fictione juris* enter into the estate in so far as regards the sum upon which the charge proceeds. When, therefore, the bond is for more than the value, the adjudication secures the whole property, which becomes effectually vested in the heir by means of an assignation of the adjudication, granted by the trustee in his favour in implement of the arrangement. The report of the case of *Craigie v. Kerr, &c.* 19th January 1808, shews the nature of this tentative title. It carries only such right as the party may have, and is not, therefore, excluded by a competition of services depending ; nor is it excluded, although his right be entirely denied, or the succession be that to an estate strictly entailed. When the fee of an estate is full by the infeftment of a living party, special service is incompetent, because the inquest

EFFECT OF
TRUST BOND
AND ADJUDICA-
TION AS A TEN-
TATIVE TITLE.

M. voce "Adju-
dication,"
App^x. No. 16 ;
1 Ross, L. C.
353.

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F. C. ; 1 Ross,
L. C. 395.

F. C. ; 1 Ross,
L. C. 394.

M. 14,487 ;
1 Ross, L. C.
349.

M. 14,070 ;
1 Ross, L. C.
366.

2 S. 369.

F. C. ; 2 Sh.
App. 115 ;
1 Ross, L. C.
362.

TRUST-DISPO-
SITION AND AD-
JUDICATION IN
IMPLEMENT, AS
A TENTATIVE
TITLE.

M. 12,641.

could not in such circumstances return an affirmative answer to the inquiry whether the ancestor died last vest and seised. In these circumstances, therefore, the trust-bond and adjudication is the proper form of procedure to try the right of a new claimant ; *Cunninghams v. Glen*, 27th February 1812. It might also be tried by a general service, but that imports a universal representation ; *Carmichael v. Carmichael*, 15th November 1810 ; affirmed on appeal.

The title by adjudication upon a trust-bond is thus a method known and established in the Law of Scotland, and vests an active right in the truster, and transmits to his heirs ; *Hepburn v. Scotts*, 25th July 1781. The truster, therefore, can effectually transact, and judicial acts done by him are pleadable as *res judicata* against his heir ; *Gordon v. Ogilvie*, 17th February 1761. But, in order to be effectual, this title must be completed by infestment ; and if, after obtaining adjudication, the heir shall not take infestment, but go on to expedite a title in the ordinary feudal form, that amounts to abandonment of the adjudication, to which, therefore, his title cannot afterwards be ascribed ; *Bellenden v. Lady Essex Kerr's Trustees*, 6th June 1823. An heir who makes up a title in this way to the succession of a remote ancestor is liable for the debts of an intermediate predecessor who has possessed three years on apparenacy, under the Act 1695, § 24, exemplified in the case of *Carmichael*, *supra*, affirmed on appeal.

In the case of *Dunlop v. Cochrane*, 4th July 1820, affirmed on appeal 31st March 1824, an attempt was made to try the right to an estate, not by a trust-bond, but by a trust-disposition, and adjudication in implement ; but that was found to be incompetent, where the estate is in the possession of another under an *ex facie* good title. The disposition to a trustee with adjudication in implement is, however, a competent and sometimes advantageous method of expediting titles to an estate of which the succession is not disputed.

It only remains to observe here, that, when the propinquity of an heir entering by trust-bond and adjudication is challenged, he must establish it by proof ; *Geddes and Clark v. Bull*, 25th February 1796.

PECULIARITY IN TRANSMISSION OF HERITABLE RIGHTS ARISING FROM
THE NATURE OF THE SUBJECT.

In pursuing the subject of transmission, it is necessary still to attend more particularly than we have yet done to the mode of entry with the superior, and of expediting charters from the Crown ; but before entering upon these subjects, it is necessary to notice shortly some heritable rights, in which the nature of the subject occasions a peculiarity, or modification of the ordinary rules, in their transmission.

1. *Crown Rights.*

Upon these it is only necessary to observe, that rights acquired by the Crown require no sasine, and are not indeed capable of completion by infeftment, inasmuch as there is no superior to invest the Crown. Thus lands falling by forfeiture to the Crown are *eo ipso* consolidated with the superiority. When the Sovereign succeeds to a feudal right, he or she must be served heir in special to the deceased, and the service when retoured to Chancery establishes a perfect right in the Crown, of which an example is given by Mr. Erskine.

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CROWN'S RIGHT
COMPLETE
WITHOUT
SASINE.

Inst. ii. 3, 44.

2. *Salmon Fishings.*

Trout fishings, as we have already seen, pass as part and pertinent of the adjacent land. But salmon fishings are *inter regalia*, and do not pass unless specially conveyed. In the absence of a special conveyance, therefore, they continue the property of the Crown, whose right to salmon fishings is not confined to rivers, creeks, and estuaries, but extends to fishings in the open sea in connexion with the shore; *Commissioners of Woods and Forests v. Gammell, &c.* 6th March 1851. We have already seen, that a charter *cum piscationibus* has been held a good title to prescribe a right to salmon fishings by possession for forty years. But the proper title is a specific grant, which may either be in a charter of lands, or in a charter conveying the fishings alone. A separate grant may be made to a person possessed of no adjacent land, and, according to a rule already observed, this right entitles him to reasonable access through the neighbouring property. When the right is once established, it may be disposed as a separate estate, and the title is completed by infeftment, the symbol according to the former practice being net and coble. Both the conveyance and infeftment may now, however, be in the abbreviated form provided by the Lands Transference Act, and Infeftment Act, and completed according to their provisions.

TRANSMISSION
OF SALMON
FISHINGS.

13 D. 854.

3. *Teinds.*

Teinds or tithes consist of a portion of the fruits of the soil, originally appropriated to the support of the Church. They are of two kinds—the parsonage teind or greater tithes, consisting of corns, and the vicarage teind, which consists of the smaller produce, as grass, flax, hemp, &c., and also calves, eggs, &c.

CONVEYANCE
OF TEINDS.

At the Reformation all teinds which had not previously been separated were annexed to the Crown, and disposed to the Lords of Erection or Titulars of the tithes, under the burden of a limited provision to the reformed clergy.

ANNEXATION
OF TEINDS TO
THE CROWN.

1572, c. 52.

In order to relieve landholders from the burden and inconvenience of specific exaction, they were empowered to get their teinds valued,

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VALUATION
AND PURCHASE
OF TEINDS.

and to acquire them from the titular at nine years' purchase, in terms of the decree-arbitral of Charles I. in 1629, ratified by the Act 1633, cap. 17. When the heritors do not purchase, the rate of teind is one-fifth part of the rent of stock and teind, i.e., of the lands including the teind. By the Act 1690, cap. 23, such teinds as had not been heritably disposed, but remained in the hands of the clergy, were bestowed upon the patrons under burden of stipends and augmentations; and in this case the landholder may acquire right to them at six years' purchase, because the patron had no previous title.

DISPOSITION OF
TEINDS — FORM
OF.

Inst. ii. 10, 40.

i. 152, 3d Ed^a.

The sale of teinds may either be voluntary, or it may be judicial by process of valuation and sale. In both cases the transfer is made by disposition and sasine, which according to Erskine is the only mode of transmission. The form of the disposition will be found in the Juridical Styles. In the case of a judicial sale we narrate the decree of valuation and of sale, and the term of entry thereby declared; and we narrate also the payment of nine years' purchase as the price. In the dispositive clause by the ordinary operative terms, the granter disposes all and whole the teinds, parsonage and vicarage, of the lands of A., but under burden of minister's stipend, future augmentations, and other burdens imposed or to be imposed. The obligation to infest is *a me* or *de me* under the burdens just mentioned. The warrandice is absolute to the extent of the price, but excepting the stipend payable, as well as future augmentations. There is an assignation of the rents and writs, and an obligation to make the titles forthcoming, a clause of registration, and a precept of sasine. By the previous practice, the symbol was a handful of grass and corn. But by the interpretation clause of the Infestment Act, that Statute applies to teinds, and the short precept without a symbol may, therefore, be used.

INFESTMENT ON
DISPOSITION SE-
PARATES TEINDS
FROM LAND.

13 S. 832.

M. 14,461.

Although teinds be disposed, they are not separated from the land until infestment follows; and in such circumstances, therefore, a disposition of the lands will convey the teinds, although not expressly disposed, and the donee will be entitled by the assignation of writs to take infestment upon the open precept in the disposition of teinds; *Mansfield v. Robertson*, 26th May 1835. When once separated, however, by being feudalized, a distinct title is requisite; and, therefore, where teinds had been acquired by disposition subsequent to an entail of the lands, they were found not to be carried by the entail title; *Spalding v. Laurie*, 20th February 1784. In very special circumstances, however, intention to convey the teinds will be presumed; and it is a main element in creating the presumption, if the donee is burdened with payment of the minister's stipend. The authorities for giving weight to such presumption are cited in the report of the case of *Mansfield* last referred to.

4. *Patronage.*

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The right of patronage had its natural origin in the provision of the means for maintaining religious ordinances according to the rule:—*"Patronum faciunt dos, ædificatio, fundus."* After the right arose, it was held by the founder *ipso jure*, and transmitted along with the lands without separate conveyance or sasine. But, if once made the subject of a separate title, it is thereby rendered a distinct tenement, and all subsequent disponees must complete their right by infestment; *Urquhart v. Officers of State*, 27th June 1752. A patronage may be conveyed without any portion of the lands to which it was originally united. But the conveyance must embrace the full right of patronage. A disposition in the feudal form of the right of presentation to the first *vice* or vacancy was held utterly inept in *Arbuthnot v. Calderwood*, 19th January 1821. M. 9915.
Ersk. Inst. ii.
6, 19.
F. C

The form of the disposition is given in the Style-book. After narrating the consideration, we dispose the advocation, donation, and right of patronage, of the parish and parish-church of A. The other clauses are the same as in the ordinary disposition, with the exception, that, as there are no fruits, there cannot be any assignation of rents. By the former practice, the symbols inserted in the precept and instrument of sasine were the key of the church, with the psalm-book and other symbols usual and necessary. But, as patronages are by the Infestment Act expressly included in its provisions, the short precept without any symbol may be used, and the terms of the conveyance may in every respect be framed according to the provisions of the Lands Transference Act. FORM OF DIS-
POSITION OF
PATRONAGE.
i. 156, 3d Ed.

ENTRY WITH THE SUPERIOR.

The various modes of transmission which we have now examined, must all be completed by the act of the superior, excepting in sub-infeudation, which is in itself complete as a new fee created by the mid-superior's own act. Whatever, then, may be the nature of the acquirer's right—whether he is a disponee, desiring immediate entry upon the resignation of his author—or a disponee infest, desiring to complete his title by confirmation—or, if it be a body of trustees holding warrants from a deceased vassal—or the maker of an entail or his heir, seeking to renew the investiture with the prescribed limitations—or, it may be, the purchaser at a judicial sale, with his decree and warrant, seeking an entry upon the resignation of the bankrupt, or upon the strength of the judicial transference—or a creditor or adjudger in implement with his decree of adjudication, making the same demand—or, whether, in fine, it be an heir, with or without the special service, seeking entry by precept in the lands wherein his

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ancestor was infeft, or with a general service claiming to resign upon the warrant in favour of his ancestor—all these must, in accordance with the feudal principles developed in the course of our inquiries, resort to the superior, who alone can grant it, in order to obtain the completion of their respective rights.

For delay in an entry, any reasonable hindrance is a sufficient exoneration; and, therefore, it was sustained as a good defence against action of non-entry, that the superior's father had been killed at Pinkie, and the vassal himself taken prisoner and detained in England; *Rolland v. His Vassal*, 19th March 1554.

M. 9314.

COMPLETION OF
TITLE BY RESIG-
NATION OR BY
CONFIRMATION
DIVESTS LAST
VASSAL, AND
INVALIDATES
HIS WARRANTS.

The form of the deed to be obtained from the superior, according to the nature of the warrant held by the applicant, or the condition of his title, has already been explained in treating of the charters of resignation and confirmation. Here we shall only add, that, as a general principle, it is to be held, that the completion of a title by either of these forms divests the last vassal, so that the warrants proceeding from him are no longer capable of being used to procure another entry. The words of style, no doubt, bear, that the grantee may enter by resignation or confirmation, or both, the one without prejudice of the other, but it is inconsistent with correct feudal principle to attach to these words such a construction as would authorize a recurrence to the warrants of the vassal after he has been divested by either form. Nevertheless, it was certainly held in the case of *Stewart v. Earl of Fife*, 20th February 1827, and in the previous case of *Cunningham v. Haldane*, 3d January 1754, that a sasine might competently be taken upon a charter of resignation and confirmation, whereby the infeftment already taken upon the disposition was confirmed. The best Conveyancers, however, have found insuperable difficulties in reconciling this decision with feudal principle; and, while it is proper that the practitioner should be aware of its terms, it would be very unsafe for him to follow it in any degree as a precedent. It is different, however, where from any cause the first entry fails of effect, because the warrant of the last vassal remains in force until he is validly divested; *Kibble v. Stewart*, 16th June 1814. Here, the confirmation of a title having proved inept by reason of ineffectual registration of the sasine, that was held no bar to the disponent completing his title by resignation.

5 S. 383.

5 Br. Supp.
809; 2 Ross,
L. C. 157.

F. C.; 2 Ross,
L. C. 209.

ENTRY BY CON-
FIRMATION AND
PRECEPT OF
clare.

Where the ancestor was infeft base, and has left no warrant for infefting his heir, it would be a circuitous and expensive method to enter the heir by resignation upon the procuratory of the last-entered vassal, because, after entering by charter and sasine, he would have to evacuate the base fee in his ancestor's person by granting precept of *clare constat* in favour of himself, and then consolidating by resignation *ad remanentiam*. The necessity of a procedure so complicated is obviated by obtaining from the superior a charter of confirmation

of the ancestor's infeftment, combined in the same deed with precept of *clare constat* in favour of the heir. Of this we have an example in the Juridical Styles. It is followed by infeftment, which completes the title. In adopting this form of entry, however, the confirmation must be in the old form, specifying every deed confirmed. The succinct form of confirming only the last infeftment is limited by the terms of the Lands Transference Act to the cases in which it is the *sasine* of the receiver of the charter that is confirmed; and that form is not applicable, therefore, in combination with the precept of *clare constat*, where the infeftment confirmed is that in favour of the deceased ancestor.

The first point to be looked to by a party applying for an entry is the competency of the superior. In order to validate the entry, the superior must himself be infeft, and we have already had occasion to notice the total failure of a title, in consequence of the trustees by whom it was granted having all died without being infeft; *Martin v. Wight*, 3d February 1841. When the superiors are heirs-portioners, a vassal is not bound to take an entry in separate portions. Upon the principles which protect him against division of the superiority, the entry must be granted by the whole jointly, or the eldest alone may, by the prerogative of her birth, grant it; *Lady Luss v. Inglis*, 30th July 1678. In practice the concurrence of all should be obtained. But we have already seen, that it is not a multiplication of superiors to vest the *dominium directum* in two persons *pro indiviso*, and, when they both concur in granting an entry, the vassal may not refuse it; *Cargills v. Muir*, 21st January 1837. A liferenter by constitution is not capable of entering a vassal, because the superior must be infeft in the fee. The effect of a blunder in this is shewn by *Henderson v. Mackenzie*, 19th February 1836. Here, A. entered erroneously with the liferentrix of the superiority, and conveyed *mortis causâ* to trustees, excluding his heir-at-law. The heir thereupon made up a title as heir to the last vassal who had entered correctly, his own entry being taken from the superior of the fee, and by virtue of this title he reduced that conveyed to the trustees. But, if along with the liferent of the superiority a special power is conferred on the liferenter to enter vassals, then he may competently do so; *Gibson-Craig v. Cochrane*, 10th July 1838; affirmed, 23d September 1841.

It seems now to be established, that the vassal's entry is good if taken from the party who appears *ex facie* of the records to be the superior, although it may afterwards be ascertained that his title was erroneous. This is one of the points decided in the case of *Gibson-Craig* just referred to, and the same doctrine was afterwards applied in *Innes v. Gordon*, 20th November 1844, where it is distinctly stated to be the law, that, if the vassal takes an entry from the apparent

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i. 176, 3d Ed^a.

COMPETENCY
OF SUPERIOR
TO GRANT
ENTRY.

3 D. 485.
WHERE SUPERIORS ARE
HEIRS-POR-
TIONERS.

M. 15,028.

15 S. 408.
SUPERIOR MUST
BE INFEST IN
THE FEE, TO
GRANT ENTRY.
14 S. 540.

16 S. 332.
2 Rob. App.
446.

ERROR IN TITLE
OF SUPERIOR.

7 D. 141.

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TERMS UPON
WHICH ENTRY
GRANTED.ENTRY OF
TRUST-DISPO-
NEES.

F. C.

2 S. 681.

8 S. 213;
2 Ross, L. C.
315.

M. 9293.

16 D. 437.

TERMS ON
WHICH ENTRY
GRANTED TO
HEIRS OF EN-
TAIL.
M. 15,047; 2
Ross, L. C. 329.
M. 15,068;
2 Ross, L. C.
335.6 S. 94;
2 Ross, L. C.
389.4 D. 684;
8 Bell's App.
128; 2 Ross,
L. C. 340.

superior, that title is good, although the superior's title be afterwards reduced.

We have already shewn the difference of the terms upon which heirs and singular successors are respectively entitled to have the investiture renewed in their favour. The privilege of entering as heir is strictly personal to the heir himself, and cannot, therefore, be claimed by any party who holds by a singular title. Trust-disponees, therefore, although holding for the benefit of the heir, must enter as singular successors, and pay a year's rent; *Grindlay v. Hill*, 18th January 1810. But the superior is debarred from this claim if he recognise the heir; and, therefore, in *Hill v. Mackay*, 5th February 1824, the superior having called the heir along with the trustees in a declarator of non-entry, and the heir having thereupon offered to enter, the superior was held bound to receive him. And, when the heir of the disponer is willing to enter, (thus saving the disponent a year's rent,) it would appear that the superior cannot refuse to receive him; *Pigott v. Colvill*, 9th December 1829. But, as a general rule, the superior may refuse to enter the heir, unless his right is established by a service; *Fullerton v. Denholms*, 18th July 1678. The action of non-entry is correctly directed against trustees having a personal right, but the pursuer is bound to call the heir-at-law pointed out by them; *Magistrates of Hamilton v. Hart's Trustees*, 2d February 1854.

With regard to an heir of entail, it was held by Mr. Erskine, that an heir of entail is not a singular successor, but is entitled to entry upon payment of relief duty alone, in support of which he cites the case of *Lockhart v. Denham*, 10th July 1760; while Lord IVORRY, in his note to the passage, refers to the case of *The Duke of Argyle v. The Earl of Dunmore*, 19th November 1795, in which the question was regarded as doubtful. The difficulty here was felt to arise not from the change of the destination, because the composition is full satisfaction for that, but from the admission of a condition which necessarily, while entails remained in their vigour, precluded future change, and so cut off permanently the superior's chance of obtaining a composition. But, in *The Duke of Hamilton v. Baillie*, 22d November 1827, an entry having been given to an heir of entail with the series of heirs as in the entail, it was held that after forty years' possession the superior's heir could not object to enter another heir of entail upon payment of relief; and, in *Stirling v. Ewart*, 14th February 1842, affirmed 4th September 1844, it was settled, that the superior, having given an entry to an heir of entail on payment of a year's rent, is not entitled to claim a year's rent upon entering a subsequent heir of the investiture, although a stranger in blood to the heir whom he succeeds, but is bound to enter him upon payment of relief only.

The superior is entitled to give the entry in such manner that his

legal rights may not be evaded ; and, therefore, although he is bound to grant and deliver a precept of *clare constat*, which cannot be assigned, he cannot be forced to deliver a charter of resignation, under circumstances imposing a stranger upon him as vassal, without payment of a year's rent ; *Magistrates of Musselburgh v. Brown*, 21st February 1804. It is well settled, however, that a vassal in whose favour a feu-charter has been granted may possess without infeftment, and that he is entitled to assign it, and the assignee to possess without taking an entry, as long as the precept has not been exhausted by a deceased party ; *Stewart v. Burnside*, 12th November 1794. Successive parties may thus possess without liability to enter. In the case of *Gordon v. Grant*, 29th June 1814, it is reported to have been decided, that a superior is not bound to enter a vassal deriving from an author unentered, unless the author also shall take an entry. But it is stated by Mr. Bell in his Commentaries, that the Court has again and again taken occasion to deny that decision as reported, and to recommend that it should be publicly understood, that no such determination was given. Mr. Bell adds :—" It is indeed not law."

The composition payable by a singular successor consists of the amount of a year's rent for which the lands are let, or may be let, at the time of the entry, under deduction of feu-duty, public burdens, annual burdens imposed with the superior's consent, and reasonable annual repairs to houses and other perishable subjects ; *Aitchison v. Hopkirk*, 14th February 1775. The vassal is also entitled to deduction of one-fifth part of the rent for teind, whether the teinds have been valued or not ; *Thomson v. Simson*, 24th November 1825.

When a singular successor pays composition, he is entitled to a charter in favour of himself, and any series of heirs he chooses to name, all of whom the superior must enter on payment of relief alone, the year's rent being full satisfaction for his doing so ; *Magistrates of Aberdeen v. Burnet*, 17th June 1808 ; *dictum* of Lord COREHOUSE in *Duke of Hamilton v. Baillie*, recently cited ; and, in the subsequent case of *The Duke of Hamilton v. Earl of Hopetoun*, 8th March 1839, it was held by the whole Court, that a purchaser of a subject from a vassal-superior is entitled upon payment of a year's rent to obtain charter and precept in favour of himself and his heirs-of-law in any order in which he chooses to place these heirs, provided he does not go beyond them to strangers, and that he is entitled to require his charter to be assignable, and to assign it before infeftment to any person he pleases, and to the heir of that person, and that such assignee has a right as broad as his author, and may require of the superior a charter in favour of himself and his heirs-at-law in any order he chooses ; and that the heirs of either the purchaser or his assignee are entitled to enter on payment of relief only.

A superior is not bound to enter a corporation, because a corpora-

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M. 15,038 ;
2 Ross, L. C.
166.

M. 15,027 ;
2 Ross, L. C.
161.

i. 26.

COMPOSITION
AND DEDUC-
TIONS THERE-
FROM.

M. 15,060 ;
2 Ross, L. C.
163.

4 S. 224 ; 2
Ross, L. C. 189.

VASSAL PAYING
COMPOSITION
MAY DICTATE
SERIES OF
HEIRS.

M. voce "Superior and Vassal," No. 4.
1 D. 689 ;
2 Ross, L. C.
391.

ENTRY OF A
CORPORATION.

- PART III.** tion never dies, and by the entry of it, therefore, his rights would be permanently excluded; *Hill v. Merchant Company of Edinburgh*, 17th January 1815. But an entry to the office-bearer of a corporation and his successors in office, for the use and behoof of the corporation, is an entry to the corporation, and the superior having once granted this, he is not entitled, when charged for an entry, to demand a year's rent; *Campbell v. The Orphan Hospital*, 28th June 1843. In cases where a corporation is vassal, it is usual to stipulate for a duplicand once in each period of twenty-five years, as the supposed average of human life, but the Court will not enforce this or any other arrangement which is not consented to by the parties. In *Earl of Mansfield v. Gray*, 22d May 1829, a feu-charter to a company stipulated a duplicand every twenty-five years, and a payment of £500, if in violation of a prohibition a sale should be made. A sale having been made, payment of the £500 was enforced.
- CHAPTER III.** F. C.; 2 Ross, L. C. 320.
- 5 D. 1273.
- 7 S. 642.
- ORIGINAL CHARTER CONTROLS CHARTERS BY PROGRESS.**
- Craig*, ii. 2, 27; ii. 12, 9.
- Hume, 459.
- 4 D. 482; 3 Ross, L. C. 404.
- 10 D. 1079.
- We have already noticed the general character of the charter by progress as distinguished in its effects from the original grant, the conditions of the feu being established by the first charter, which, accordingly, regulates the renewals of the right, and must be referred to in all questions arising out of charters by progress, which thus bend to the authority of the original charter; and, although the clauses of the first grant may not be expressed in subsequent charters, they are still held to be present in these by implication. The doctrine is strongly illustrated by the case of *Mackerrell v. Lord Keith*, 21st January 1801. Here, the holding in the original charter, dated 1602, was blench, and the *reddendo* one penny Scots. In 1702 this was altered in a renewal of the investiture to £12 Scots. The £12, however, had never been received, and the superior having given a charge for it in 1801, the alteration was held to have been a blunder, and the *reddendo* found to be regulated by the original charter. The case of *Graham v. Duke of Hamilton*, 27th January 1842, is another illustration, the vassals in lands under rights dating from 1657 having had the entire right of property by their titles, until in 1778 a reservation of mines and minerals in favour of the superior was inserted in a precept of *clare constat*. No specific possession of the minerals having taken place, it was decided that the reservation was ineffectual, the superior not being entitled to resume any part of the property or to change the nature or measure of the original grant; and, in *Threipland v. Rutherford*, 30th May 1848, a right of hunting having been excepted in renewals of the investiture for eighty years, but a prior charter and other prior titles having been discovered, containing no such reservation, it was held to be inconsistent with the original titles, and disallowed. Where, too, the superior's obligation to enter a particular party for a taxed composition has entered the record, it is not lost by the omission of it in the titles of the superior's

successor ; *Learmonth v. Governors of Trinity Hospital*, 15th February 1854. PART III.

The statute 1592, cap. 138, was passed to prevent injury to third parties upon the renewal of rights by the vassals inserting boundaries advantageous to themselves. This, however, has been found to apply, only where the renewal of the investiture is in favour of the vassal himself, and not where the charter is granted to a stranger upon the resignation of the vassal, whose warrandice is necessarily a security against the insertion of lands not truly embraced in the title ; *Creditors of Tillycoultry v. Murray*, 5th December 1701. CHAPTER III.
16 D. 580.
AGAINST INSERTION OF WRONG
BOUNDARIES.
Act 1592,
c. 138.
M. 21,743.

On applying for an entry the vassal must produce his predecessor's titles ; and he is bound also to make a full production of the previous titles. When the vassal is a singular successor, production of his sasine in the declarator of non-entry is not sufficient, unless the warrant also is produced ; and, where the sasine proceeded upon a charter and two assignations, production of the charter and one of the assignations was held insufficient ; *Maconochie v. Governors of Trinity Hospital*, 29th May 1852. Sometimes the amount of the *reddendo* does not appear on the face of the title, but is determined by the usage which has taken place, and this is a rule conclusive against a vassal who cannot or does not make a full production so as to instruct that he is erroneously charged ; *Earl of Mansfield v. Trustees of Scone's Lethindy*, 14th June 1831. VASSAL APPLY-
ING FOR ENTRY
MUST PRODUCE
TITLES.
Stair iii. 5, 49.
14 D. 813.
9 S. 739.

When there is a defect in the previous title, or arrears of feu-duties or casualties remaining due to the superior, the vassal may apply for a charter or clause of *novodamus*, which secures him against the defect of the right as regards the superior, and from liability for the arrears, because *novodamus* has the effect of an original right, and implies a discharge of bygone duties. The clause of *novodamus* may contain a first grant as well as the renewal of a former one, and every subject expressed is effectually conveyed to the vassal, although there be no antecedent title to it in his person ; *Scot v. The Archbishop of Glasgow*, 29th February 1680. When the *novodamus* is qualified by the words "*used and wont*," then the right conferred by it is restricted to the extent of the previous use ; *Bruce v. Rashiehill, &c.*, 25th November 1714. It is evident, however, that a grant by *novodamus* is ineffectual without a warrant, there being no property in the superior to re-issue, if it remains unredeemed in the person of the last vassal. Of this there is a striking illustration in *Grieve v. Williamson*, 11th December 1760. Here, there was a disposition with procuratory and precept, but not followed by resignation or sasine. Afterwards, the superior without receiving resignation granted a charter confirming the disposition to the disponent in liferent and his son in fee. The charter contained a clause of *novodamus*, and infeftment followed upon it. Upon the son's NOVODAMUS.
M. 9339.
M. 9342.
Novodamus
INEFFECTUAL
WITHOUT WAR-
RANT.
M. 3022 ;
2 Ross, L. C.
152.

PART III. death, his creditors having taken steps to attach his right of fee, the
CHAPTER III. father took infeftment in his own favour upon the original disposition, and this was held to be an effectual title, the *novodamus* being a nullity because without warrant, and the charter ineffectual, inasmuch as the fee was full, and, no resignation having taken place, the lands were not in the superior's hands.

SUPERIOR INCURS NO LIABILITY BY GRANTING AN ENTRY.

M. voce "Superior and Vassal," Appx. No 3.

INSERTION OF BURDENS, ETC., IN CHARTER.
Lands Transference Act, § 6.

LIABILITY FOR CUMULO FEU-DUTIES, WHERE FEU DIVIDED.

14 S. 233.

The charter by progress is prepared by the superior's agent, and, as the superior, according to the feudal notions, acts from favour, it is to be held as a general rule, that the style which he chooses to adopt, if legal, and such as to secure the vassal's just rights, must be assented to; and, as the superior is held to interfere at the vassal's request, and only does what he may be compelled to do, his own rights are protected by the clause *salvo jure cujuslibet*, which necessarily relates, not to the right of superiority, but to any claim which the superior may have in connection with the property of the feu. The superior thus incurs no liability, and is not responsible even for the sufficiency of his own title. Accordingly, in *Syme v. Erskine*, 16th June 1801, a superior having inadvertently or through forgetfulness granted an entry after he was himself divested was found not to be liable in reparation to the creditors of the vassal for loss of their recourse against the property in consequence of the error.

If any burdens affecting the feu are not referred to in the sasine or otherwise upon the record, the superior may insist upon their being inserted in the charter. There must be borne in mind, also, the necessity under the Infeftment Act of inserting in the charter of resignation the deduction of titles formerly required in the instrument, where the granter or grantee of the warrant is dead.

While the vassal is at liberty to subdivide his feu, that does not infringe upon the right of the superior to have his returns and casualties adequately secured. Although, therefore, the feu-duty and composition may be apportioned among different disponees, the superior is entitled to have every one of them made ultimately liable for the *cumulo* feu-duties and casualties, he being bound, on the other hand, to grant upon payment an assignation of the claim, in order to enable the feuar who pays to operate his relief against the others for their proportions. The terms of a clause for giving effect to this arrangement were carefully adjusted in the case of *Wemyss v. Thomson*, 19th January 1836. When the superior, however, has consented to an apportionment of the feu-duty, the reservation of his recourse for the full amount against the proprietor of each of the subdivided parts, although sufficient to enable him to recover arrears due by other portioners, is not effectual to authorize a declarator of irritancy *ob non solutum canonem*. That is a penal action, and the Statute authorizes it only in relation to the full feu-duty. The superior's remedy, therefore, as regards each of the parties who is not in arrear himself, is

confined to personal action and diligence, and pointing of the ground ; *Knight v. Cargill*, 2d July 1846. PART III.

When an entry has been obtained, the charter operates to the heir as an implied discharge of all former feu-duties ; *Gibson v. Scot*, 2d M. 6500. CHAPTER III.
February 1739 ; *Incorporation of Tailors of Glasgow v. Blackie*, 11th 13 D. 1073. 8 D. 991.
June 1851. And we have already seen, that it produces the effect of fixing by its own terms the destination to heirs, other destinations contained in latent personal fees being thereby sopite.

In conclusion upon this subject, it remains only to observe, that the casualty of non-entry is not purged by taking out a precept or charter, unless it is followed by sasine ; *Hay v. Auchnames*, 23d M. 9291. March 1630.

Mode of forcing an entry.—We are now to consider what remedy is available to the vassal, when he cannot obtain an entry through the refusal or delay of the superior, or the imperfection of the superior's own title. There have been three great efforts in the history of our law to remove the difficulties and obstructions occasioned by the partiality of the feudal system to the interests of the superior. Before the Rebellion of 1745, if a subject superior refused to enter a vassal, it was necessary to obtain from Chancery three consecutive precepts, commanding him to grant the entry. After failure to obey these, similar precepts might be obtained against the next higher or mediate superior, and upon his failure in like manner the successive overlords might be charged, until the vassal reached the Crown, by whom an entry is never refused. This troublesome and expensive procedure was so far remedied by the Act 20 Geo. II. cap. 50, by the 12th section of which an heir is entitled on production of the retour, and a singular successor with his procuratory of resignation, to obtain letters of horning, charging the superior to enter them upon fifteen days' notice ; and, if the casualties were tendered at the same time, the superior was bound either to grant the entry, or to state his reasons in a suspension of the charge. He was always entitled to decline, until the previous titles were produced, in order that the entry might be prepared according to their provisions. The foregoing was the remedy before the Lands Transference Act, when the superior was himself infest. When his title had not been made up, the heir was entitled to charge him under the Act 1474, cap. 57, to enter within forty days under the penalty of losing the vassal for his lifetime, a forfeiture which, in consequence of the particular terms of this Act, extended only to the casualties, and not to the fixed annual duties. The superior having failed to enter as charged, the vassal could after expiration of the *inducies* apply to the next over-lord for an entry. In order to have the benefit of this remedy, it was necessary to have the tinsel of superiority established by a decree of the Court of MODE OF
FORCING ENTRY
BEFORE 1745.
HORNING
AGAINST SUPER-
IORS UNDER
20 Geo. II.
c. 50, § 12.
CHARGE
AGAINST SUPER-
IOR NOT IN-
FEFT ; 1474,
c. 57.
DECREE OF TIN-
SEL OF SUPERI-
ORITY.

- PART III.** Session before obtaining a charter; *Dickson v. Lord Elphinstone*, 1st July 1802. But, although entry was thus obtained from the overlord, the vassal and his disponees were not thereby relieved of the obligation for the feu-duties to the superior who had been passed over; *Wallace v. Earl of Eglinton*, 26th February 1835, and *Wallace v. Crawford's Executors*, 5th December 1838. Here, a party after decree of tinsel obtained a charter from the Crown, proceeding upon *præceptum omissionis superioritatis*. His disponee also entered with the Crown in the same terms as if it had been immediate superior. This without prescription was held insufficient to relieve the disponee of the feu-duties, for which, accordingly, he was found liable to the true superior upon his completing a title within the period of prescription. The vassal is not bound to wait the issue of any question in dependence touching the right to the superiority, but is entitled immediately to obtain his decree of tinsel, and go to the overlord; for, although the Statute 1474 enjoins the superior to enter without fraud or guile, these words were held here, as in other old Statutes, to mean simply without prejudice to the vassal; *Dickson v. Lord Elphinstone*, already cited.
- CHAPTER III.** The remedies now detailed formed but an imperfect cure, on account of the expense and delay unavoidably attendant upon the procedure. At the same time, estates of superiority had been greatly multiplied by the advance of commerce, the increase of population, and the extension of cities and towns. The nature of the elective franchise before the Reform Act had also led to a great increase in the number of estates of superiority, the value of which was destroyed by that Statute, the annual returns being in very many instances elusory. Hence arose great difficulty and inconvenience in obtaining entries, for, after the superior's death, there was no sufficient substantial interest remaining to the heir to induce him to incur the expense of making up a title. It was to remedy these inconveniences that the provisions of the Lands Transference Act were directed, in so far as they give increased facility in obtaining entry from the superior. This facility is created in two ways:—1st, By making it compulsory to grant charters of confirmation; and 2d, By enabling the vassal more readily to resort to the over-superior, and providing for the temporary or permanent forfeiture of the immediate superiority, or for the relinquishment of it by the immediate superior.
- M. 15,024.** *INCONVENIENCE OF OLD METHODS REMOVED BY LANDS TRANSFERENCE ACT.* 10 & 11 Vict. c. 48.
- 1. COMPULSORY CONFIRMATION —AVAILABLE ONLY WHERE PARTY INFEST.** Compulsory confirmation is enacted by the 6th section; and the benefit is provided to parties infest upon four different kinds of warrant. It is, therefore, available only to a party infest; and confirmation under the Statute, therefore, is clearly incompetent before infestment. The different warrants are these:—(1.) Conveyance from the last-entered vassal. (2.) Conveyance from one whose own title is capable of being made public by confirmation. In either of

these cases, the disposition must contain an obligation to infest *a me*, or an obligation to infest *a me vel de me*. It would appear, therefore, that confirmation is incompetent, where the manner of holding is not mentioned. (3.) Decree of special service. (4.) Decree of adjudication or sale with warrant of infeftment. On production of his sasine, and any one of these warrants, the party may, by applying to the Lord Ordinary on the bills, (shewing in his application the terms and conditions of the holding,) obtain warrant for letters of horning to charge the superior to grant confirmation in the same way as the like diligence is used for compelling entry by resignation. The party is to tender the duties or casualties, and the superior must grant the charter, or shew grounds for his refusal in a suspension. The superior may insert in the charter the *tenendas*, the *reddendo*, and all other clauses and conditions of the former charters, if not already on the record or duly referred to in the title; but, if such clauses and conditions are already inserted or referred to, then the charter may not contain them without the vassal's consent.

The above remedy will, of course, be effectual only where the superior is infeft. When the superior's title has not been completed, the statute allows two lines of procedure, accommodated to the greater or less value of the superiority.

When the *reddendo* does not exceed £5 a year, the right of superiority may be absolutely forfeited. The procedure prescribed by this view is an application to the Lord Ordinary on the bills for an order on the superior within thirty days, (sixty if in Orkney or Shetland, or abroad,) to get himself infeft, and enter the vassal, or to shew cause for his delay or refusal, with certification of forfeiture if he fail. If this order is not complied with, the petitioner may, after the days of intimation, obtain a judgment forfeiting the right of superiority, and finding the petitioner, and his heirs and successors, entitled to hold in all time coming of the next over-superior by the same tenure, and for the same *reddendo*, as under the forfeited superiority. This judgment, when extracted and recorded in the register of sasines appropriate to the lands, extinguishes the right of superiority, and enables the petitioner to apply to the over-superior, as now his immediate superior, for a charter. The charter is to contain the same *tenendas* and *reddendo* as the titles of the forfeited superiority, and the lands are to be held according to these in all time coming, the holding of the intermediate superiority being thus obliterated.

When the *reddendo* is greater than £5 a year, or, in the option of the party, whether it exceeds that amount or not, the procedure is directed, so as to create a *temporary* forfeiture of the superiority. Here, the procedure is similar, but the certification in the first order is, that the superior shall forfeit, not the superiority, but the duties

2. PROCEDURE
TO OBTAIN ENTRY
UNDER
LANDS TRANS-
FERENCE ACT,
WHERE SUPE-
RIOR NOT
INFEST.
(1.) WHERE
reddendo DOES
NOT EXCEED £5.

(2.) WHERE
reddendo
ABOVE £5, OR
AT VASSAL'S
OPTION IF
BELOW £5.

PART III.
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and casualties payable on entry, and that the petitioner shall be entitled to retain the yearly feu-duties, until he is reimbursed of the expenses of the petition, procedure, and making up his title in this manner. After the intimation has expired, a judgment may be obtained of the import now stated, with a warrant to the petitioner to obtain an entry from the Crown, or in his option from the mediate over-superior, as in *vice* of the party refusing. The expenses may be judicially taxed under the application, and decree obtained for retention of the amount. The extract of the judgment is a warrant for a charter from the Crown, which will be obtained by observing the procedure to be explained when we review the Crown Charters Act. The Crown charter in this case bears that the lands are "*to be holden of the Crown, while the immediate superior remains unentered, and thereafter until a new entry in favour of a vassal become requisite, by the same tenure by which they were holden by the immediate superior.*" And the *reddendo* is,—"*for payment to the immediate superior of the annual duties and casualties, but that only upon completion of his title to the superiority.*" The extract decree will also contain warrant for letters of horning to charge the over-superior, in the event of the vassal choosing to enter with him. The effect of these steps being only to forfeit the superior's rights, while he lies out unentered, the forfeiture is only temporary, and the rights revive in their full effect, upon the superior completing his title.

RELINQUISH-
MENT OF SUPER-
IORITY.

But it may frequently happen, that the superior will himself desire to be permanently divested of the superiority, and the Statute provides for this. Under the 11th section, he may lodge a note relinquishing the superiority in favour of the petitioner and his heirs. Of this relinquishment the petitioner may himself, or by his counsel, accept. But he is not compelled to accept, and he may, if he prefers it, refuse the relinquishment, and enter with the Crown or the over-lord. If he accepts, the authority of the Lord Ordinary is interponed, and the right of superiority becomes extinguished, so that thenceforth the petitioner shall hold of the superior of the relinquished superiority. By the decree the petitioner obtains warrant to apply to the over-lord as now the immediate superior; and the charter for the renewed investiture must in this case contain the *tenendas* and *reddendo* of the relinquished superiority. By the 20th section of the Statute, the judgment of the Lord Ordinary in these proceedings is subject to review, but, if not reclaimed against, it is final, and, if it is reclaimed against, the judgment of the Court is final without appeal.

EFFECT OF DE-
CREE, WHERE
FORFEITURE OR
RELINQUISH-
MENT OF SUPER-
IORITY.

The effect of the investiture obtained by forfeiture or relinquishment is distinctly defined by the Act, (§ 12,) in conformity with feudal principles, to be the same, as if the superior's heir had made up titles, and conveyed the superiority to the petitioner, and the latter, after completing his title to it, had consolidated the separate

rights of superiority and property now in his person by resignation *ad remanentiam*. In consistency with this it is enacted, that the interests of the over-superior shall not be extended, his rights remaining the same as if the superior's heir had entered and continued his vassal. PART III.
CHAPTER III.

Upon losing the superiority by forfeiture or relinquishment, the § 13. heir is entitled to the value of it under deduction of expenses, and the receipt of the value does not infer representation beyond its amount.

Forfeiture and relinquishment are made competent, notwithstanding § 14. prohibitions against subinfeudation, or either estate being entailed. When the superiority is entailed, the price is to be applied in terms of the Lands Consolidation (Scotland) Act, 1845; and, when the vassal's estate is entailed, the price paid for the superiority is to be held and treated as an entailer's debt.

CROWN CHARTERS.

We have now taken a survey of the feudal investiture in the origin of the feu, its transmission by the various methods conventional and legal, and the renewal of the grant by the same authority from which its creation was derived. Hitherto, in some measure, the subject has been viewed in an abstract form without limitation to any one class of feus, the indefinite capability of multiplication being an inherent characteristic of the feudal system, as undefined extension is of the Gothic Architecture; and, in truth, the same principles pervade the whole scheme, from the most noble feu, which recognises no superior but the Crown, down to the humblest, which cannot reckon the degrees of its removal from that fountain-head of feudal rights. There is a variety, however, in the mode of granting entries to Crown vassals, consisting in the procedure by which the investiture is renewed, and the terms upon which it is granted. The difference is thus one of form and detail merely, the principles upon which these rights depend being the same as in all other feudal dependencies. But it is necessary for the Conveyancer to be acquainted with the peculiarities referred to, and we proceed, therefore, to explain the mode of expeding Crown charters, shewing, first, the procedure which obtained before the alterations introduced by the recent Statute, and, afterwards, that which must now be observed. A knowledge of the former practice is required, in order to test the authenticity of titles expedited under it. The importance of this was strikingly illustrated upon the trial of a party claiming the title of Earl of Stirling by the Court of Justiciary in 1839, a full report of which was prepared by Professor Swinton. The charge was the alleged forgery of a Scotch

PART III. charter, the evidence relied upon being, in part, proof by Crown
CHAPTER III. officers and experienced Conveyancers of a want of conformity in the document with the practice and regulations in regard to expediting and sealing, without which no authentic writ of the description could have been obtained.

1. FORMER PRACTICE IN EXPEDING CROWN CHARTERS.

1555, c. 20.

WARRANT FROM VASSAL NECESSARY.

Every Crown Grant formerly proceeded upon a *Signature*—a writ deriving its name from its bearing the Sovereign's Signature, or other equivalent Royal Warrant. Anciently it appears, that the Sovereign was accessible to the solicitation of private parties; and the Crown property was encroached upon, and injured, by warrants thus granted without inquiry. It was, therefore, ordained by the Statute 1555 cap. 20, that no Signature should be presented but through the King's ordinary officers. The Barons of Exchequer acted as commissioners for the Crown in examining and passing Signatures, until their duties were transferred to Judges of the Court of Session.

In order to obtain a Crown charter, there must be a warrant from the vassal, as in the case of a subject superior. That warrant may consist of any of the writs, voluntary or judicial, which we have reviewed as effecting a transmission of the feu; and the nature of the charter is determined by the same feudal principles as in the cases we have examined. If the applicant has a personal title with a procuratory from the last entered vassal, he obtains a charter of resignation; if he be infeft upon that vassal's warrant, a charter of confirmation. Where his author was infeft base, he may either take infeftment, and obtain charter of confirmation, or obtain warrant of infeftment from the Crown in a charter of resignation and confirmation, divesting the last vassal by confirmation of his disponent's infeftment and of the infeftments of all subsequent disponents down to the author of the applicant, so as to make resignation upon his warrant effectual. And here, as in any other case, a vassal already entered may obtain a charter in order to a new investiture for any legitimate purpose. He may proceed upon a procuratory of resignation granted by himself, limiting his own right to a liferent, and propelling the fee, whereby his heir may be saved the expense of a service after his death—or for new infeftment in favour of himself in the full right, with a view to change the disposal and destination after his death. This is a common mode of procedure to create a new investiture in terms of an entail.

The signature was a writ framed and indorsed by a Writer to the Signet, the privilege of acting in this matter being confined to members of that body. It contained the whole clauses of the charter desired, for which it formed the warrant, after being approved by the Crown officers. It was called a signature of resignation, or of confirmation, or of sale, or of adjudication in implement, or *contra hæreditatem jacentem*, according to the species of warrant upon which the

applicant proceeded. There were also signatures of *ultimus hæres*, proceeding upon a gift from Exchequer, when subjects had fallen to the Crown through failure of heirs.

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The clauses of a signature of resignation were these:—

CLAUSES OF
SIGNATURE OF
RESIGNATION.

(1.) *The dispositive*, which it was indispensable should contain everything intended to be conveyed by the charter.

(2.) *The quæquidem*, deducing the right from the last entered vassal by disposition, procuratory, or decree.

(3.) *The tenendas*, containing the holding with its parts and pertinents. This clause contained the only material difference from the charter by a subject superior, in the long list of obsolete terms expressing the accessories of the grant.

(4.) *The reddendo*, expressing the duties, which must be in exact accordance with the last charter, otherwise the Barons would not pass the signature.

The signature of confirmation differed in having no dispositive clause, its office being discharged by the clause of confirmation; and it had also no *quæquidem*.

FORM OF SIGNA-
TURE OF CON-
FIRMATION.

If the party desired to change the name of the lands, that might be done, care being taken so to express the dispositive clause, as to identify the lands under the new name with the old description. When the subject consisted of part of a barony, it was necessary that the lands should be described as part of the barony, the last charter being referred to, and the disposition produced, in order to instruct the identity of the lands; and, unless the *reddendo* was indivisible, it might in this case be split, upon a petition to that effect, and the share of it corresponding to the share of the purchase inserted in the new charter.

NAME OF LANDS.

SPLITTING
reddendo.

The heritable powers of jurisdiction implied in a right of barony were abolished by the Act 20 Geo. II. Its remaining effects are to carry mills, harbours, and ports, ferries, and their customs, &c., which are not comprehended under parts and pertinents in an ordinary charter. The right of barony also implied, what might also be obtained by a special clause, viz., the right of union, which was valuable before the recent Infestment Act in authorizing one sasine for discontinuous subjects. As the right of barony imported privileges so valuable, it could only be granted upon a petition to the Treasury; and, when it had been granted, lands might be added to it in subsequent charters. The Barons were entitled to grant a disjunction from the barony in favour of a party who had purchased part of it. It is necessary to keep in view, that, notwithstanding the privilege of single infestment by union implied or expressed, registration, if not made in the general record, was necessary in each particular register proper to any part of the lands.

EFFECTS OF
BARONY.

The mode of expeding signatures is to be found in the Juridical i. 472, 3d Ed.

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FORMER MODE
OF EXPEDING
SIGNATURES.

Style. It was shortly this:—A note having been lodged of the name of the party and of the lands, the signature, indorsed by the Writer to the Signet who had prepared it, was left with an officer called the Presenter of Signatures. It was afterwards revised by one of the Barons, and subsequently by one of the Judges, substituted in their place, who along with the writer compared the description and *reddendo* with the former charter or retour, the title-deeds being produced. When found correct, it was signed by the revising Baron on the back and on every page but the last, which was afterwards signed by the whole Barons. Then the composition was struck in the way presently to be explained, marked on the signature by the Baron, and paid to the Receiver-General. On the last day of term resignation was made in the hands of the Barons by a macer of Court on behalf of the last vassal, using a pen as in place of staff and baton. The signature thus revised was signed by the Presenter of Signatures, and given to the King's Remembrancer for registration in the Exchequer records. It was then taken to the office of the Great Seal, and stamped at the top with the *cachet*, which was a seal bearing a *fac-simile* of the Royal Signature. The *cachet* sufficed, when the grant was merely a renewal, but the Royal Superscription was necessary, when the charter contained any new grant or privilege.

PRECEPT UNDER
THE SIGNET.

The signature thus completed was the warrant for a precept under the Signet. This precept contained in Latin the whole tenor of the signature, with which it required to preserve an exact conformity. It was directed to the Keeper of the Great Seal, and formed the only legal warrant to the Director of Chancery to prepare the charter, the intermediate precept under the Privy Seal, which was formerly necessary, having been dispensed with by 49 Geo. III. cap. 43, § 13.

THE CHARTER.

The charter was written in Chancery in the character peculiar to that office, and marked at the end with the words, "*written to the seal and registered and sealed.*" It was then sealed in the office of the Great Seal, the Keeper of which signed a separate note at the end bearing the words, "*sealed at Edinburgh,*" with the date. After being sealed, the charter was returned to Chancery, in order that, under the Act of Sederunt, 11th July 1808, the date of sealing might be entered in the Register.

2. MODERN
PRACTICE UN-
DER CROWN
CHARTERS ACT.

These forms have been altered by the 10 & 11 Vict. cap. 51, called The Crown Charters Act. By this statute signatures and precepts, as preliminary to Crown charters, are abolished. The applicant is now to lodge with the Presenter of Signatures a draft of the charter which he desires, prepared and indorsed by a Writer to the Signet, along with a short note praying that a charter in these terms may be granted. He is also to produce the last charter, or retour, or decree of service, and precept from Chancery, with the subsequent titles and

§ 1.

§ 2.

evidence of the valued rent, in order to test the description and furnish *data* for fixing the composition. The Presenter is to revise the draft charter with the agent. If he is not satisfied with the titles produced, he is to make a marking to that effect, and return the draft to the party, who may obtain a review by the Judges or Judge acting in Exchequer upon a note of objections, and, if these are sustained, the draft is remitted to the Presenter to revise. There is provision for enforcing production of previous grants or titles, and, if these cannot be got, reference to the respective registers is provided for. When mistakes have occurred in the last charter, or retour, or decree of service, these, whether prejudicial to the Crown or to the vassal, may be corrected in the new charter after a report by the Presenter to the Judge in Exchequer. The revised draft is to remain with the Presenter accessible to the party, who may also get a copy. When no objections are made to the revisal, the draft being docketed by the Presenter and agent as approved, and having the composition endorsed upon it by the Presenter and Auditor of Exchequer, is to be sent by the former to Chancery, where it is to be received as a valid and sufficient warrant for the immediate preparation of a charter. If the party is dissatisfied with the revisal, or the amount of the composition, he may appeal to the whole or one of the Judges, and their judgment repelling the objections, or authenticating alterations admitted in consequence of them, is to be the warrant of the charter. Immediately after the warrant in any of the foregoing shapes is received at Chancery, a charter is to be prepared in terms of the draft, sealed with the Seal of the treaty of Union, recorded, and delivered upon payment of the same fees as at present. It is unnecessary to read the forms of the charters authorized by the Statute, and contained in a schedule subjoined to it. The form of resignation is expressly abolished.

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§ 3.

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When the applicant desired to obtain a clause of *novodamus*, which was formerly inserted chiefly in order to protect against previous feudal delinquencies, it was necessary to petition the Crown, and to produce a search of the records for forty years, to show that the Crown would not be prejudiced, and in this case the warrant required the Sovereign's Superscription after a report by the Barons. Now, in order to a grant of *novodamus*, the party must obtain the consent of the Commissioners of Woods and Forests, or any two of them, and produce such consent to the Presenter of Signatures, and the charter cannot be sealed without the Sign-manual of Her Majesty, and the signatures of three Commissioners of Her Majesty.

CLAUSE OF
NOVODAMUS IN
CROWN-CHARTER.

The Precept from Chancery.

When the ancestor of a Crown vassal has died publicly infest, and without leaving any warrant for the entry of his heir, the heir, after being served, has it in his power to obtain infestment by procuring a

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1. OLD FORM OF
PRECEPT FROM
CHANCERY.Ersk. Inst. ii.
8, 44.8 & 9 Vict.
c. 35.2. NEW FORM.
10 & 11 Vict.
c. 51.

§ 18.

PRECEPT MAY
NOW BE ISSUED
ON PRODUCTION
OF GENERAL
SERVICE.
§ 20.

warrant called a precept from Chancery, which is similar in its nature to a precept of *clare constat* by a subject superior. The form used before the Crown Charters Act is given in the Juridical Styles. It was addressed to the Sheriff of the county where the lands lay, and, when the lands lay in several counties, to the Sheriff of that in which the heir intended to take his sasine. It proceeded upon a narrative of the retour of the special service, embracing the description of the lands with a reference to the past charter, the clause of union, and the other heads of the brief, and it concluded with a command to give sasine, taking security for the retour-duties due to the Crown, of which the amount was specified. The effect of this precept was expressly limited, so that it could not be used after the term next subsequent to its date, because the retour-duties are enlarged by lapse of the term. By an ancient custom the Sheriff was entitled to an ox as his fee for the infestment, called the *sasine ox*, which was latterly converted into a sum of money. But the vassals of Church lands not exceeding £200 Scots were exempt from payment of the *sasine ox*. The privilege of the Sheriff to grant infestment upon the precept from Chancery is abolished by the Infestment Act, § 6, which provided, that the precept might be addressed to any notary public, but should be void, unless the sasine be recorded before the next term. Compensation is provided by this enactment to the Sheriffs and Sheriff-clerks then existing, as long as they shall continue in office.

The old mode of infestment is continued by the Crown Charters Act with some change in the procedure and form. When the heir has been served in special, he is to lodge with the Presenter of Signatures the retour or decree of his service, with a draft of the precept which he desires, prepared by a Writer to the Signet. The form of the new precept is substantially the same as before, the heads of the brief being omitted, and the command directed to any notary public instead of the Sheriff. Along with the draft, and a note praying for the precept, the last charter and other titles must be lodged. The draft is revised by the Presenter with the same right of appeal as in the case of a charter, and his docquet, or the judgment of an Exchequer Judge is a sufficient warrant to the Director of Chancery to prepare and issue the precept, which is valid, provided the dues and composition be paid before it is issued.

A very important change in the law is introduced in the 19th section, which enacts that a precept from Chancery may be granted on production of a decree of general service, and that the infestment following upon the precept so issued shall be valid. A record of precepts is appointed to be kept in Chancery, extracts from which are to make faith in every case except improbation.

The convenient mode of entry by charter of confirmation and precept, combined in one deed, may now be obtained from the Crown under the 21st section of the Act.

Reference has already been made to that portion of the Crown property in Scotland which is appropriated to the Prince of Wales. When there is no Prince, the vassals of the Principality receive their entry from the Sovereign, as King, Prince, and Steward of Scotland, and the signature formerly, and consequently the draft charter now, must be framed throughout as granted by the Sovereign in that character. When the Prince is under age, the charter is granted by the Sovereign as his administrator-in-law. Formerly, when the Principality was separate, the Barons held a separate commission from the Prince to manage his affairs in Scotland, and to receive resignations, and grant new infeftments. The signatures passed in Exchequer as in Crown grants. The precept was sealed with the Prince's Signet in Exchequer, and formed a warrant to Chancery for writing the charter which passed the Great Seal in Exchequer. The signature was recorded in Exchequer, and the charter in Chancery, but in separate books from those of the Crown vassals. The procedure prescribed by the Crown Charters Act expressly applies to lands held of the Prince, as well as of the Crown; and a note in the schedule directs the necessary alterations when there is a Prince, the charter being then in name of the Prince, or of His Majesty as his administrator-in-law; and it is provided by § 34, that the Prince may appoint his own Presenter, and a grant of *novodamus* can only be issued upon the Sign-manual of the Prince when he is of full age.

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ENTRY OF
VASSALS OF THE
PRINCIPALITY
OF SCOTLAND.

By the former practice all Crown grants were in Latin. Charters, precepts from Chancery, and sasines are now appointed to be in English.

Conditions irritant and resolute of entails, as well as burdens in other titles, may now be preserved in effect, when already inserted in § 26, 27. the records, by reference to such insertion.

The vassals of the Crown and Prince are allowed to enter in some respects upon different terms from those of other superiors. If an heir enters by decree of service and precept from Chancery, he is charged with the whole non-entry duties, consisting of the new extent or valued rent, since his ancestor's death, and also with the relief. When a disponent enters he is charged with ten merks, provided he is the heir of the investiture. If he be a singular successor, the composition is one-sixth of the valued rent as instructed by the valuation books in Exchequer, or by the certificate of two Commissioners of supply and the collector of cess of the county. When the parties entering are heirs-portioners, the eldest pays as an heir for her share, and the others are charged as singular successors. Where the right is redeemable, as in a charter of adjudication, the party has the option to compound either by the valued rent or by a percentage on the principal sum. The composition, as we have seen, is now fixed by the Presenter and the Auditor of Exchequer, and it is appointed to be

TERMS ON
WHICH CROWN
VASSALS ARE
ENTERED.
Ersk. Inst. ii.
5, 37.

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**COMPETITION
 OF CROWN
 RIGHTS.**

M. 3028.

M. 1337.

**10 & 11 Vict.
 c. 51, § 23.**

When a competition arose between two Crown vassals, no preference was given in respect of priority in passing the signature, for that was an incomplete right, and such priority could only be founded upon with effect, when a contending party had acted with undue precipitation in urging through his charter; *Miln v. Powfoulis*, 6th December 1768. The rule of preference was the priority of sealing, because the seal first perfects the confirmation. The date of sealing, therefore, determines the priority of the charter, and, by Statute 1568, cap. 56, the first right confirmed is preferable; *Lord Cardross v. Van Sommerdyke, &c.* March 1682. By the Act 1661, cap. 62, in order to prevent undue preferences by adjudication, it was enacted, that all comprisings within year and day of that which was first made effectual should rank *pari passu*. In order to fix this rule more clearly, it was enacted by the Act 54 Geo. III. cap. 57, § 11, that the presenting a signature in Exchequer, when the holding is of the Crown, and recording an abstract of the signature in the register of abbreviates of adjudication, should be held the proper diligence to make an adjudication effectual. The continuance of this rule is provided for in the recent Statute, which enacts, that lodging the draft charter and note shall be equivalent to presenting a signature in Exchequer, and that recording a copy of the note and an abstract of the draft charter shall be equivalent to recording the abstract of the signature.

§ 10.

Formerly charters could only be expedited during certain periods of the year called terms in Exchequer. The public convenience has been studied in the new arrangements, which provide, "that a charter may be applied for, revised, prepared, and delivered, at any period of the year, although it may not be term time in Exchequer."

BURGAGE HOLDING.

The constitution and various modes of transmission of subjects held by the burgage tenure are peculiar in their forms, and it will, therefore, be convenient to examine them separately, and in one view.

Burgage is the tenure by which Royal burghs hold their houses and lands of the Sovereign. In a few instances the holding is of a subject superior, the burgh having been a burgh of barony or of royalty before being erected into a Royal burgh. Even in these cases, however, the liberties and privileges are holden of the Crown.

**CHARTER OF
 ERECTION.**

Constitution of Royal burgh.—The first constitution of a Royal

burgh is by charter of erection from the Crown, by which the subjects and privileges are bestowed. This charter is effectual without sasine, because at the erection there is no person yet in being who can receive infestment; *Aytoun v. Magistrates of Kirkaldy*, 4th June 1833; and this right needs no renewal, the vassal being a community, which never dies. The feudal character of the burgage tenure is held by Craig to be ward-holding with the community for vassal, and, in the charter of the burgh of Inverkeithing, the *reddendo* is *servitium solitum et consuetum*, which the law interprets to be military service. Accordingly, the services of watching and warding are held to be inherent in this tenure, and due within burgh, whether stipulated or not.

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As the charter does not require to be renewed, so the holding is not subject to casualties, the vassal never being in minority, nor marrying, nor dying.

NO CASUAL-
TIES.
Stair, ii. 3, 38.

The individual proprietors to whom the burgage property is conveyed by the magistrates, are vassals holding immediately of the Crown, and the baillies of the burgh are the Crown's baillies for giving infestment, under the Statute 1567, cap. 27. The magistrates may also themselves acquire for the community by prescriptive possession subjects of which they have granted repeated investitures in favour of a party who had no possession; *Aytoun*, already referred to. From the character of burgh proprietors as Crown vassals it follows, that, if the burgh should be suppressed, they continue to hold of the Crown, although the burgage tenure ceases; *Urquhart v. Clunes*, 17th January 1758. But, while the burgh subsists, entry by the Crown in lands held burgage is incompetent, and a posterior right granted by the magistrates was preferred in *Countess of Kincardine v. Earl of Marr*, February 1686.

BURGAGE PRO-
PRIETORS ARE
CROWN VAS-
SALS.

Transmission of burgage subjects.—This can only be effected by the intervention of the superior through the magistrates as the Crown's baillies, a precept of sasine by a party infest in burgh lands being inept. Resignation is, therefore, the only mode of entering a singular successor, and there is no room for confirmation in burgage subjects. We have already referred to the proper symbols of resignation as fixed by Act of Sederunt, 11th February 1708, and subsequent decisions in conformity with it, whereby the use of any symbol but staff and baton was prohibited under sanction of nullity. But this is now of importance only in titles anterior to the recent Burgage Tenure Statute.

10 & 11 Vict.
c. 49.

We shall now examine the form of transmission, 1. *inter vivos*, and 2. to heirs.

1. A precedent of the disposition formerly in use will be found in the Style-book, vol. i. p. 604, 3d edition. It contained these clauses:—

1. TRANSMIS-
SION OF BURG-
AGE PROPERTY
inter vivos.

(1.) The narrative, containing the consideration. (2.) The dispositive,

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(a.) CONVEY-
ANCE OF BURG-
AGE SUBJECTS
UNDER THE OLD
FORMS.

including the description of the subjects, the operative words being the same as in a disposition of feudal subjects. (3.) The obligation to infeft, to be holden of her Majesty in free burgage for service of burgh used and wont. (4.) Procuratory of resignation, empowering procurators to compare before the Lord Provost, or one of the baillies, and resign the lands into their hands, as in the hands of Her Majesty, immediate lawful superior thereof, in favour and for new infeftment to be granted to the disponent. (5.) The clause of warrandice. (6.) The clause of relief of public burdens. (7.) The assignation to rents and writs. (8.) The clause of delivery of writs. (9.) The clause of registration. (10.) The testing clause.

COMPLETION OF
DISPONEE'S
TITLE BY RESIG-
NATION.

The title of the disponent was completed by resignation by staff and baton in terms of the procuratory in the hands of a magistrate upon the ground of the subjects, and delivery of sasine by the magistrate to the disponent by the symbols of earth and stone, and hasp and staple. These acts were embodied in one instrument under the hands of the town-clerk, as possessing by the Act 1567, cap. 27, the exclusive privilege of acting as notary in burgage subjects, under the pain of nullity. This rule was recognised and acted upon in *Dawson and Mitchell v. Magistrates of Glasgow*, 14th November 1827, affirmed 31st March 1830. When the town-clerk is himself to be infeft, the Court has granted warrant to the Sheriff-clerk of the county to act as town-clerk *pro hac vice* in expediting the infeftment; *Duff v. Magistrates of Elgin*, 16th January 1823. This privilege of passing infeftments within burgh is peculiar to clerks of Royal burghs, and the clerk of a burgh of regality cannot acquire a similar privilege by custom; *Magistrates of Edinburgh v. Howat*, 2d February 1814. But Lord GLENLEE here took a distinction between burghs of regality having the privilege of entering by hasp and staple, (in which he thought the privilege might be acquired,) and those in which the holding is feudal.

TOWN-CLERK
ACTS AS NO-
TARY-PUBLIC.

6 S. 19.
4 Wil. & Sh.
App. 81.

2 S. 117.

F. C.

CONVEYANCE OF
PERSONAL RIGHT
TO BURGAGE
PROPERTY.

The personal right of a disponent of burgage subjects may be transmitted to any number of successive acquirers by disposition and assignation, the procuratory of the party last entered remaining the effectual warrant, which is, accordingly, produced, when infeftment is ultimately taken, along with the successive writs by which the party infeft obtained right to it.

WHO MAY GIVE
SASINE IN BURG-
AGE SUBJECTS.
M. 6892.

M. 6893.

Ersk. Inst. i. 3,
23.

When there are no magistrates or town-clerk, a sasine given by the Sheriff-clerk was sustained in *Thomson v. M'Kitrick*, 21st July 1666; and sasine given in 1653, during the Commonwealth, by the then Provost and a common notary, was sustained in respect of the times; *Thomson v. M'Kitrick*, June 1662. When the city of Edinburgh was without magistrates in 1745, and there were, therefore, no baillies to receive resignation or give sasine, the Court appointed certain baillies for that special purpose, until a new magistracy should be established

in due course of law. This Mr. Erskine thinks a better expedient than to have sasine given by the Sheriff of the county *ex necessitate*. The usual course is the appointment of managers by the Court of Session, until the corporate rights are restored, with special powers to receive resignations and grant infeftment; *Philp*, 18th January 1832.

With regard to registration, burgage sasines are excepted from the Act 1617, cap. 16, in consequence, it is supposed, of the town-clerks having been tolerably regular in booking the sasines in their protocols. This exactness having sometimes failed, however, the Act 1681, cap. 11, was passed, in terms of an Act of Sederunt immediately prior in date, establishing burgh registers of sasines, and requiring sasines, reversions, &c., to be registered within sixty days under pain of nullity. An irregularity having crept in, consisting in the insertion of the docquet in the register in an abbreviated form, the Act 10 Geo. IV. cap. 19, was passed, sustaining the validity of instruments thus imperfectly registered previous to its date, but requiring for the future that the notarial docquet should be introduced at length, otherwise the document to be null.

The forms which have been substituted in place of those described are contained in the Act 10 & 11 Vict. cap. 49, an Act to facilitate the transference of lands held on burgage tenure. The Statute is permissive in its form, and allows dispositions and other conveyances to be in the abbreviated terms contained in the schedule. It is unnecessary minutely to examine the clauses of the new form. They are in every respect similar *mutatis mutandis* to those which we have examined minutely in the Lands Transference Act. The effect of the clauses is fixed by § 2, which gives to the obligation to infest and clause of resignation the same peculiar effect as in the previous form. The assignation of rents here has the same effect as in the other Statute, giving right to the rents falling due after the term of entry specified in the dispositive clause. In like manner the clause of warrandice, if not qualified, is to imply absolute warrandice of the subjects and of the writs, and personal warrandice of the rents. The 3d and 4th sections provide for giving effect to the conditions of entails and real burdens and conditions in other rights, by reference, where these have already entered the register.

In order to obtain infeftment it is not now necessary to appear before a magistrate, or go to the subjects or to the Council-chamber, or to use any symbol; but resignation may be made, and infeftment obtained, by presenting the warrants to the Town-clerk, being a notary-public; and an abbreviated form of the instrument similar to that in feudal subjects is substituted. In a note to the schedule containing the form of this instrument, it is directed, that the witnesses shall

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Inst ii. 3, 41.

REGISTRATION
OF BURGAGE
SASINES.

1681, c. 11.
10 Geo. IV.
c. 19.

(b.) CONVEY-
ANCE OF BURG-
AGE SUBJECTS
UNDER NEW
FORMS.
10 & 11 Vict.
c. 49.
CLAUSES OF DIS-
POSITION.

§ 5. INFEST-
MENT UNDER
NEW FORM.

PART III. sign on the last page only, thus removing, in regard to burgage sasines,
CHAPTER III. an ambiguity connected with other sasines from the terms of the
§ 6. Infestment Act. The instrument is to be recorded as formerly, the
§ 7. date marked by the keeper of the record being the date of the
instrument, which is effectual if registered at any time during the
party's life.

2. TRANSMIS-
SION OF BURG-
AGE SUBJECTS
TO HEIRS.

2. The mode of entering heirs in burgage subjects is not affected by the Burgage Tenure Act. The form is peculiar, and constitutes another exception to the principle of heirs entering by judicial sentence. The baillies of all royal burghs, and of several burghs of regality have acquired by immemorial usage the right to cognosce and enter heirs in burgage tenements without service by inquest or otherwise. Evidence is adduced to the baillie and Town-clerk of the claimant's propinquity to the person last infest, whose sasine is produced, whereupon the baillie declares him heir, and, according to the ancient form, ordains him to take hold of hasp and staple of the door, symbols appropriate to burgage tenements, and to enter the house, and bolt the door. The heir, after he came out, took instruments in the hands of the Clerk as notary.

INSTRUMENT OF
COGNITION AND
SASINE.

This procedure is set forth in a notarial instrument of cognition and sasine, bearing the appearance of a procurator for the claimant with witnesses before one of the baillies upon the ground of the subjects, production and publication of the last sasine, proof of the propinquity by the subscribing witnesses, and then that the baillie did cognosce and enter the claimant as nearest and lawful heir, and gave delivery by hasp and staple and with earth and stone. This instrument is complete evidence in itself both of the propinquity and of the entry. By the Infestment Act, the form of this instrument continues the same as at present, excepting that the docquet of the Town-clerk as notary is dispensed with, if the instrument be attested by him and the witnesses; and the delivery of symbols may either take place, as before, upon the ground of the subjects, or within the council-chamber of the burgh by delivery of a pen.

8 & 9 Vict.
c. 35, § 7.

10 & 11 Vict.
c. 47, § 26.

NO COMPOSI-
TION PAYABLE,
OR PASSIVE
TITLE INCURRED.

M. 15,081.
M. 9731.

1 Br. Supp. 482.

Service and entry *more burgi* are expressly exempted from the operation of the Service of Heirs Act.

There is no composition payable here, for the baillie is commissioner and not superior; *Hay v. Baillies of Aberdeen*, 22d July 1634. Entry by cognition and sasine has the same effect as by precept of *clare constat*, the heir not being thereby subjected in a universal passive title; *Blount v. Nicolson*, 26th February 1783. It appears to be competent for the baillies to enter the heirs of burgages by precept of *clare constat*; *Lockhart v. Kennedy*, July 1662. But this mode of entry is not observed in practice.

It was formerly competent, and it was the practice in some burghs,

to enter heirs in burgage subjects by special service, which proceeded before the baillie, by whose authority it was completed; and here the service did not require to be retoured to Chancery, being in itself the sentence of a judge, an extract of which was sufficient warrant for infeftment. Special service was also competent before the magistrate upon a brief from Chancery, in which case it required to be retoured. The latter of these forms appears to be now abolished by the Service of Heirs Act, which renders it incompetent to serve by virtue of a brief from Chancery, or otherwise than according to its own provisions.

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ENTRY BY SPECIAL SERVICE BEFORE MAGISTRATES.

10 & 11 Vict. c. 47.

The same care must be taken in burgage entries, as in others, that the party is described in his proper character, and that he has right to the warrant upon which he claims and obtains infeftment. The cognition and sasine, like the precept of *clare constat*, or precept from Chancery, is effectual only to the heir of the last-entered vassal claiming as heir, and not as in right of any warrant. When the claimant, therefore, is entitled to a burgage subject, not as heir of the vassal last infeft, but as having right to an unexecuted procuratory in favour of a party deceased, the right to the procuratory must be taken up by general service; *Creditors of Cuming v. Maconochie*, 4th December 1783.

COGNITION PERSONAL TO HEIR OF LAST ENTERED VASSAL.

GENERAL SERVICE NECESSARY, WHEN ENTRY CLAIMED IN VIRTUE OF UNEXECUTED WARRANT.

M. 14,446.

The feudal forms of transmission must also be attended to, in so far as required by the particular nature of the burgage tenure; and, if the right is conferred by a procuratory of resignation, the infeftment is void, if it do not bear that resignation took place; *Houston v. Houston*, 4th February 1784. Here, there was a disposition by the ancestor in favour of himself in liferent, and of the heirs of his body in fee, whom failing, in favour of John Houston. There being no heirs, John took infeftment on the disposition *more burgi*, but the instrument did not bear that the baillies had cognosced and served him as heir of provision, or that, in virtue of the procuratory, the subjects had been resigned in their hands. The title was reduced.

M. 14,420.

Burgage property being exempt from terce, on the ground, it is supposed, of its being the heir's residence, and incapable of division, a wife, therefore, will get no benefit from subjects belonging to her deceased husband within burgh, unless there be a special conveyance in her favour—a rule which requires attention in marriage contracts and other family settlements. The rule, however, is dependent upon the nature of the holding, and not upon the local situation of the property, and lands held feu of magistrates or others are subject to terce, although lying within the limits of the burgh.

BURGAGE PROPERTY EXEMPT FROM TERCE.

Provisions as to general and special charges, and actions of constitution and adjudication, are made in regard to burgage subjects, of the same nature as in the Lands Transference Act.

The power to feu burgage lands appears to have been recognised

- PART III. at an early period, being referred to in the *Leges Burgorum*, § 95.
 CHAPTER III. A base infeftment in security of annual rent, recorded in the burgh
 POWER TO FEU books, was sustained in the case of *Bennet v. Sclanders*, 5th July
 BURGH LANDS. 1711; and under the authority of that decision, a practice arose of
 M. 6895. granting heritable bonds with precepts for infeftment in burgage sub-
 jects. There is no doubt now, although it was a question much
 agitated until a recent period, that the magistrates can grant feu-
 rights of land belonging to the burgh, to be holden of themselves.
 This was first decided in the case of *Dean v. Magistrates of Irvine*,
 M. 2522. 4th July 1752. They cannot, however, feu without an act of Council,
 and an adequate consideration; *Magistrates of Selkirk v. Clapperton*,
 6 S. 955. 11th June 1828; and the disposal of the heritable property of the
 burgh by feu, alienation, or tack, can now only be made by public
 roup after twenty days' advertisement in a newspaper, and by notices
 affixed in public places; 3 Geo. IV. cap. 91, § 5. It was doubted,
 until lately, whether the magistrates have power to convey otherwise
 than by feu-holding; and the question was raised in the case of
Dawson & Mitchell v. Magistrates of Glasgow, 14th November 1827,
 6 S. 19. where the tenure was in these terms:—"To be holden in free burgage
 "for service of burgh used and wont, and for payment to the magis-
 "trates of £20 Scots yearly of feu-duty." This, however, was
 decided to be a burgage holding, and the decision was affirmed, 31st
 4 Wil. & Sh. March 1830. The point occurred again in another case, where magis-
 App. 81. trates conveyed to be holden of the King in burgage for performance of
 burghal services, and also to be holden of themselves in feu-farm for
 payment of a stipulated feu-duty. There was a burgage procuratory,
 and no precept of sasine, and a burgage title was expedite. The ma-
 gistrates having sued for composition upon an entry, the demand
 being placed upon the footing of its being a feu holding, they were
 held to have no title to maintain that action, the holding being burg-
 age, and vassalage to two superiors at the same time incompetent;
Magistrates of Perth v. Stewart, 18th December 1830. At a future
 9 S. 225. stage of the case, while the Court held the defender to be personally
 bound by the stipulations of feu-duty and composition, they refused
 to declare them real burdens; 11th July 1835.
 13 S. 1100. It thus appears clear, that feu-duties cannot be properly stipulated
 in a burgage holding, with which they are inconsistent; but ground
 rents may be effectually stipulated for, and in that case they ought
 to be protected by a conventional irritancy of the subject in the event
 of the ground rent being allowed to fall into arrear, for it is doubtful,
 whether the Act 1597, cap. 246, authorizing irritancy *ob non solu-
 tum canonem*, would apply, since it refers expressly to vassals by
 feu-farm.

We have already had occasion to observe, that, when the holding
 is not burgage, registration in the burgh record is inept. It is un-

necessary again to cite the cases of *Davie v. Denny*, *Dixon v. Lowther*, and *Lord Fife's Trustees v. Magistrates of Aberdeen*, by which this rule was introduced, departed from, and again established.

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supra, p. 561.

It is only the lands contained in the charter of erection of the burgh, that hold or can be holden burgage. If the corporation purchase other lands, of which the tenure is not burgage, in these it becomes a vassal like any other purchaser, and its title will be regulated by the same principles.

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RIGHTS LIMITING THE RIGHT OF PROPERTY—REDEEMABLE RIGHTS—
LIFERENTS—LEASES—SERVITUDES.

OUR inquiries hitherto have related to the mode of constituting, transmitting, and extinguishing the radical title to heritable rights. We are now to attend to the instruments used in creating burdens or limitations upon the radical right, or by which the use of the subject may by contract be conferred upon another.

I.—RIGHTS IN SECURITY.

THE BURDEN
MUST BE SPE-
CIFIC.

M. 14,127;
2 Ross, L. C.
648.

These are used for the most part to make the right of property available as a security for money; and we are first to notice, as a principle common to all such securities, whatever form they may assume, that the extent of the burden, and the name of the creditor, must both appear upon the face of the instrument, the rule being imperative and without exception, that no permanent unknown incumbrance can be created on land, because the purchaser must have the means of discovering the creditors in burdens affecting the subjects, and the amount of their claims; *Stein's Creditors v. Newnham, Everett, & Co.*, 1st February 1793, affirmed on appeal. Every instrument, therefore, by which an heritable security is created, must bear the name of the creditor, and the amount of the debt.

1. *The real burden.*

In the real burden we have the most simple form of an heritable security.

Constitution of real burden.—It is constituted by the act of the proprietor, declaring the lands affected by the burden of payment of a sum of money specified to a creditor named, or by the burden of whatever liability forms the subject matter of the contract. The principles upon which real burdens receive effect, are contained in Stair, and in Bankton. These passages relate to *debita fundi et onera realia*, and shew that reserved burdens, in order to be effectual, must be made real upon the subject. A

Stair, iv. 35, 24,
and ii. 3, 54.
Bank., ii. 5, 25.

proprietor may charge his lands with burdens clearly expressed, so as to constitute a lien or real burden—as, with the burden of a sum named, or with the burden of the payment of that sum—or he may declare the right to the lands void, if payment be not made within a specified time. These are all forms of real burdens. But, when the disponee is taken bound to pay, without words imposing the burden on the lands, or without making the right void upon failure of payment within a certain time, although such an obligation is binding upon the disponee and his heirs, no real incumbrance is thereby imposed upon the subjects; *Mackenzie v. Lord Lovat*, 1st April 1721. The deed here declared, that the disponee and his heirs should be affected and stand burdened with the payment of the granter's debts. The Court of Session held this to constitute a real burden, but the decision was reversed on appeal. And, in *Martin v. Paterson*, 22d June 1808, the grantee was held bound by accepting the conveyance to pay a specified sum of money. The Court found that not to be a real burden, the obligation being attached to the person only, while the intention to impose a burden on land by reservation must be expressed in the most explicit, precise, and perspicuous terms. The case of *M'Intyre v. Masterton*, 3d February 1824, is to the same effect. The imposition of the burden on the lands must be contained in the disposition. A reference in the disposition to a separate deed containing the declaration of the burden is insufficient; *Allan v. Cameron's Creditors*, 19th July 1780, affirmed on appeal. And, in conformity with the rule already stated, both the sum and the creditor's name must be specified; *Stenhouse v. Innes & Black*, 21st February 1765. The burden must also be inserted specifically in the infeftment. In *Macdonald & Lawson v. Place*, 24th February 1821, no real burden was created, because, although the infeftment stated the total amount, it did not contain the creditors' names, or the sum due to each.

This is the form by which a ground-annual—that is, a perpetual annuity, payable to a third party, is attached to the feu. Besides the reservation in the title, there may be a separate bond binding the disponee and his heirs personally. Even in that case, the burden was held to follow the subjects over which it was constituted, and not to continue personal upon the original disponee, after he had been divested by *bonâ fide* conveyance; *Peddle's Heirs v. Soot's Trustees*, 27th February 1846; and the principle established by that decision was adhered to in *Small v. Millar*, 3d February 1849, although the right to the subjects had remained personal in the grantee and his assignee; and it was also held here, that cautioners bound along with the original grantee and his heirs and successors for payment of the ground-annual continued bound for the assignee, the latter being held a successor within the meaning of the obligation. But the decision in

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THE BURDEN
 MUST BE IM-
 POSED ON THE
 LANDS, AND BY
 THE DISPOSI-
 TION.

Robertson's
 App. 355;
 3 Ross, L. C. 1.

M. voce "Per-
 sonal and
 Real," App.
 No. 5; 3 Ross,
 L. C. 16.

2 S. 664.

M. 10,265;
 3 Ross, L. C.
 10.

M. 10,264.

Hume, 544.

SEPARATE PER-
 SONAL OBLIGA-
 TION BY DISPO-
 NEE FOR DEBT
 CREATED A
 REAL BURDEN.

8 D. 560;
 3 Ross, L. C.
 69.
 11 D. 495;
 3 Ross, L. C.
 90.

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1 Macq. App.
345.

Small's case was reversed on appeal, 17th March 1853, it being held, that the plain terms of the personal contract cannot be set aside on a presumption that the party was to be bound only while proprietor of the land, and that the obligation in the personal bond is perpetually binding on the principal obligant, as well as upon his sureties. In the case of *Gardyne v. Royal Bank of Scotland*, reversed at the same time, it was held by the House of Lords, that, while the claim for a ground-annual or real burden transmits against the land, the personal obligation does not transmit against the disponee of the land, unless he expressly undertake it.*

RESERVED BUR-
DEN GIVES NO
ACTIVE TITLE
OF POSSESSION.1 S. 316;
2 Sh. Ap. 164;
2 Ross, L. C.
23.

A reserved burden gives no active title of possession, because the conveyance is not to the creditor. Although a good warrant for poiding the ground, therefore, it is not a title of possession, and will not authorize process of maills and duties, until it has been followed by adjudication. The powers of the creditor in a reserved burden, however, may be enlarged by express stipulation. In *Wilson v. Fraser*, 13th February 1822, affirmed 15th April 1824, a power of sale was held to be effectually reserved; and the same decision shews, that a real burden may be effectually constituted by reservation, where the conveyance is in the form of resignation *ad remanentiam*.

FORM OF
WORDS USED TO
CREATE REAL
BURDEN.

The form of words by which this heritable security is created, is such as naturally flows from the principles now stated. Being a qualification of the grant, it forms part of the dispositive clause. Immediately after the description of the lands there is inserted a declaration, that the subjects are disposed under the burden of £1000 sterling, with interest and penalty, as contained in a bond of the same date by the disponee to the disponent, which sums are hereby declared to be a real and preferable burden affecting the said subjects, and are appointed to be engrossed in the infeftment to follow hereon, and in the future transmissions of the subject, until payment. The obligation to infeft, the procuratory of resignation, and the precept of sasine, (these being the clauses through the direct instrumentality of which the burden is to be rendered real by the infeftment of the disponee,) must all bear the express qualification, that the infeftment is to be under burden of the foresaid principal sum of £1000, interest, and penalty, contained in the said bond. A sasine following upon the disposition, in which the real burden is declared, if it should omit that burden, would be null on the ground of disconformity to its warrant. But the risk of such an omission is materially obviated by the reference to real burdens required by the Infeftment Act to be made in the precept of sasine in conformity with the former practice.

8 & 9 Vict.
c. 35.

Transmission of real burden.—The reserved burden, although an heritable right, is not a proper feudal estate. It is a lien upon the

* See the cases of *King's College of Aberdeen v. Lady James Hay*, and *Brown's Trustees v. Webster*, *supra*, note, p. 531.

lands by burden imposed upon the infeftment of another. The creditor has thus no feudal character to qualify him to impart a feudal estate to his assignee. He cannot, therefore, grant precept for infeftment. Accordingly, the proper method of transmitting a real burden is by assignation intimated to the debtor whose sasine is burdened by it, and the assignation is recorded in the register of sasines; *Miller v. Broun*, 8th February 1820.

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Hume, 540;
3 Ross, L. C.
29.

We have already seen, that, in order to continue the real burden in effect in subsequent transmissions of the lands, it is not necessary literally to comply with the injunction to insert it in the future investitures, the effect of such insertion being attained by a clause of reference as provided in the Lands Transference Act, § 5.

10 & 11 Vict.
c. 48.

Extinction of real burden.—This incumbrance is extinguished by a discharge recorded in the register of sasines, &c.; and such discharge may effectually be made by a party having right to the personal bond, although he has received no assignation of the real burden; *Baillie v. Laidlaw*, 7th July 1821.

1 S. 108.

2. The Heritable Bond.

This security had its origin in the expedients resorted to before the Reformation, in order to make profit of money, while the taking of interest was prohibited. The lender purchased a right to a fixed yearly payment or annual-rent constituted by infeftment upon land, a power of redemption upon repayment of the purchase-money being reserved to the proprietor. This species of security long continued in a similar form, the debtor, in consideration of a sum of money, infefting the creditor in a corresponding annual-rent, for which he bound himself personally, but without any obligation for the principal except upon the contingency of the creditor choosing to require payment. By the more recent form, however, (and we occasionally meet with this deed in practice,) the debtor binds himself to repay the principal sum with interest, and for the creditor's security grants obligation to infeft him in an annual-rent payable out of the lands during the not payment of the principal sum. Such rights are heritable, and are completed by infeftment, the sasine being effectual, although there are no dispositive words in the security; *Campbell or Macdonald v. Macdonald's Trustees*, 3d July 1829.

ITS ORIGIN,
AND ANCIENT
FORM.

MODERN FORM.

7 S. 826;
2 Ross, L. C.
718.

This security, it will be observed, is of the nature of a real burden by constitution. It does not carry the property of the lands as a security for the principal sum, or even for the annual-rent, but merely charges the annual-rent as a real burden. Arrears of interest are thus *debita fundi*, and the creditor may point the ground, taking the corns and other moveables upon it belonging to his debtor, and those also belonging to his debtor's tenant to the extent of the rent due by the tenant at the time. As it is the interest only which forms a burden

IT CONSTITUTES
A REAL BURDEN.

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upon the lands, the capital cannot be recovered by diligence directed against the tenants, but by personal diligence against the debtor as authorized by the bond ; and it is only by the ordinary legal forms available for the attachment of lands in security and payment of debt, that the principal can be made to affect the lands, and be recovered out of them. The deed may, however, be so framed as to embrace in the security the principal as well as the annual-rent, and, in that case, the creditor would have the benefit of the same real diligence for recovery of the principal which he has for recovery of the annual-rent. But the bond and disposition in security is the proper writ for charging both principal and interest upon the lands, and we shall presently have occasion to review that instrument.

TRANSMISSION
OF HERITABLE
BOND.

8 & 9 Vict.
c. 31.

17 & 18 Vict.
c. 62.

RENUNCIATION
ORIGINALLY
REQUIRED.

NOW, PAYMENT
OF THE DEBT
EXTINGUISHES
THE SECURITY.

M. 572 ; 2 Ross,
L. C. 707.

Transmission of heritable bond.—This security is transferred by assignation of the personal obligation, and of the right to the annual-rent constituted in terms of the debtor's obligation ; and from the general terms of the first clause of the Heritable Securities Act, 1845, the transmission may be in the short form prescribed by that Statute, and completed by registration of the assignation without the necessity of sasine. Any doubt which might have existed on this point is removed by the short Act, 17 & 18 Vict. cap. 62, extending the effect of the Acts of 1845 and 1847 to other securities besides the bond and disposition in security.

Extinction of the security by heritable bond.—As long as this security contained no personal obligation, and presented as its leading clause the debtor's obligation for the annual-rent payable out of the lands, the real right of annual-rent which it conferred could not be extinguished without the debtor's renunciation, because the real burden was the substance of the principal obligation. But, after a personal obligation for the loan was introduced, it is evident, that the infetment of annual-rent ceased to be the leading obligation, and became an accessory merely ; and, as a bond for a sum of money is extinguished by payment, the infetment of annual-rent being thus only an accessory, necessarily ceased upon extinction of the principal obligation ; *Rankin v. Arnot*, 8th July 1680.

The reserved burden, as we have seen, is a lien merely, which by certain legal steps may be made the ground of access to the lands and fruits, and, like every other claim of debt, may be used as a medium for obtaining adjudication in security. But, while it remains a real burden merely, it confers no direct title of possession in security of the debt. We proceed to the modes of constituting securities which give the creditor not only a real right of security in the land, but an active title of possession, if he shall think fit so to use it, limited by the qualification that it is a right in security only, and restricted to the extent of the debt with interest and expenses.

Rights of this nature, although they do not extinguish the radical right of property, transfer to the creditor, if he shall think fit to exercise them, the substantial powers of the proprietor as regards the fruits, and also as regards the power of sale for satisfaction of his debt; and it is on account of this transmission of right, that these securities are termed *redeemable rights*, which means, that the proprietor is entitled, by satisfying the creditor's claim, to redeem the lands—that is, to regain them free of the qualified real right bestowed by the mortgage. This power to redeem is called in our early Conveyancing the right of reversion, *i.e.*, the right of the party from whom the mortgagee's title is derived to have the lands returned to him; and reversions are either legal—as in the case of adjudications, where the law has fixed a period within which the creditor has right to satisfy the debt and have the adjudication discharged—or they are conventional, as in voluntary securities.

The ancient form of security in our law by the impignoration of land was

3. *The Wadset.*

It derives its name from *wad*, a pledge. The wadset is still occasionally met with in practice. The debtor being the proprietor, and granter of the security, was called the reverser, as having the right of redemption, and the creditor is called the wadsetter.

Constitution of the security by wadset.—Originally this security was constituted by a deed impledging the lands until the money should be paid. Afterwards, it assumed the form of an irredeemable disposition, conferring upon the creditor a right *ex facie* absolute, but he granted a separate deed, conferring the right of reversion. This form of the security, however, by giving the wadsetter a title apparently unqualified, put it in his power to defeat the reversion by selling the lands, and the Act 1469, cap. 27, in order to obviate this, gave power

HISTORY OF
WADSET.

to the reverser to resume the property on payment of the sum contained in the wadset, notwithstanding a sale by the creditor. The right of purchasers was thus rendered insecure, until the Act 1617, 1617, c. 16. cap. 16, required reversions to be registered within sixty days, under pain of nullity. After that Act, it was the practice to prepare wad-

LATER FORM OF
WADSET.

sets in the form of a mutual contract, the debtor, on the one hand, conveying the lands, and the creditor, on the other, granting the right of reversion. The loan might at any time be increased, and the additional sum secured by an *eik* to the reversion. The reverser might redeem the wadset at any time, unless it contained an irritant clause declaring, that, if the debt were not paid by a certain day, the right of reversion should cease, and the lands become the irredeemable property of the wadsetter. This irritancy was effectual, but, being penal, it was necessary that it should be judicially declared.

Extinction of wadsets.—The order of redemption consisted in the

PART III. reverser giving notice to the wadsetter to appear at the time and
CHAPTER IV. place fixed by the reversion, in order to receive payment, and renounce
 the wadset.

**ORDER OF RE-
DEMPTION.**

ii. 10, 13.

Inst. ii. 8, 17.

1 Wil. and Sh.
App. 41.

**LETTERS OF
REGRESS.**

p. 389.

ii. 371.

**DECLARATOR OF
REDEMPTION.**

17 D. 329.

It is a question amongst lawyers, whether anything more than a discharge and renunciation is requisite for the extinction, or, as Stair calls it, the destitution, of wadsets. This is a question which it might be supposed could only have occurred where the wadsetter was infeft holding of the reverser. Even in that case Stair holds, that the wadsetter is not denuded without resignation *ad remanentiam*, to extinguish the base fee created by the wadset. Erskine, on the other hand, says that simple renunciation properly registered is sufficient. This point may occur in practice, and the view expressed by Stair should be acted upon, because the point was held as not yet settled, in *Duke of Roxburghe v. Wauchope*, 9th March 1825.

When the wadset is granted to be holden *a me*, it was formerly necessary for the reverser to obtain letters of regress from his superior, in order to insure his re-entry upon extinction of the wadset. This was requisite, both that the superior might be bound to receive him, and also to insure his exemption, upon being re-entered, from the liabilities of a singular successor. Letters of regress were unnecessary after the Act 20 Geo. II. cap. 50, excepting in so far as they insured the re-entry without payment of composition. The singular successors of the superior are also bound to re-enter the reverser without composition, provided the letters of regress are recorded. Now, with regard to the extinction of the wadset in this case, there occurs among Mr. Dallas's Styles, the form of a renunciation of a wadset, bearing delivery of the contract, charter, and sasine, to be cutted, cancelled, and destroyed, although the wadset right is shewn by the terms employed to have been holden of the superior of the reverser. But in Mr. Ross's Lectures this style is censured, because, although the renunciation extinguished the right of the wadsetter, it would leave the property in the superior, the reverser being left with a mere right of regress.

If, when the order of redemption was followed out, the wadsetter did not appear, or, if he refused to receive the money and extinguish the wadset, the amount was consigned with the person or bank fixed by the deed, and a notarial instrument taken on the fact, which had the effect of stopping the currency of interest against the reverser, and formed the ground for obtaining decree in an action of declarator, whereby the lands were judicially redeemed.* The declarator of redemption, however, is competent without notice or consignation in terms of the order of redemption, the citation upon the summons being held to operate as notice, and the tender of the redemption

* The creditor in an annuity forming a real burden upon the reversion is entitled to pursue action of redemption of an improper wadset; *Wrights v. Turner*, 7th March 1855.

money at the bar of the Court as consignment ; *Campbell v. Campbell*, 10th March 1786. After consignment, the money remains the property of the reverser, until he is re-invested by the decree, because, as any step of diligence may be departed from, so he may pass from his order of redemption ; and it thus follows, that the right of the wadsetter continues heritable until the decree of redemption. After that decree, however, by which the wadset is declared to be dissolved, the creditor's right becomes moveable, and, although the money remain in the hands of the consignee, the proper diligence to attach it is arrestment ; *Stormonth v. Robertson and Rutherford*, 24th May 1814. F. C.

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M. 16, 552 ;
Hailes, 993.

Such was the procedure, when extinction of the wadset was sought by the reverser. When the creditor, on the other hand, wished to have his money, he made requisition for payment under form of instrument, the effect of which was to make the sum moveable, until a clause was adopted in practice, that no diligence should weaken the real security, after which sums vested on wadset continued heritable, notwithstanding requisition.

REQUISITION
FOR PAYMENT
AT INSTANCE OF
CREDITOR.

Wadsets are proper or improper. In proper wadsets the wadsetter took the enjoyment of the lands for the enjoyment of the money lent. So, if the rents were less in amount than the ordinary interest would have been, he had no claim for the difference ; while if they were more, he was not bound to reckon the surplus to account of principal. In this form the security had the effect of denuding the proprietor, who was not again feudally re-invested until infest on the wadsetter's procuratory or precept ; and thus the creditor obtained so much of the position of proprietor, that he was entitled under the old law to be enrolled and vote as a free-holder—a right repeatedly recognised by statute, and which is fully discussed in Mr. Bell's Treatise on Election Law.

THE PROPER
WADSET.

An improper wadset is that in which the creditor has no chance of more than his interest. On the one hand, if the wadsetter possessed the lands, and the rents were less than the interest, the debtor was bound to make up the difference, while, if they were more, the surplus was imputed to capital. On the other hand, if the debtor himself possessed the lands, which he did by a back-tack, the tack-duty or rent was the interest of the debt.

THE IMPROPER
WADSET.

4. *The Bond and Disposition in security.*

While the wadset contained much of the nature of an absolute transference in its external form, and was allowed in some respects to receive the effect of such a transference, and the heritable bond, on the other hand, conferred the right only of a real creditor for the annual-rent, the bond and disposition in security has been so devised, as to impart to the lender all the benefits derivable from these previous forms of the security, as well as from the real burden, in so far as such benefits properly belong to his position as a creditor. The grantee of

PART III. a bond and disposition in security has the position of one infeft in
CHAPTER IV. the lands themselves for security of principal, interest, and penalty,
and he may at any time take possession of the lands, or of the rents,
in order to operate payment.

Constitution of the security.—The form of this deed before the recent alterations was shortly as follows :—

OLD FORM OF
DEED.

(1.) An acknowledgment by way of narrative of the receipt of the money.

(2.) The borrower's bond for repayment of principal, interest, and penalty, in the same terms as in a personal bond.

(3.) The disposition in security, whereby, in further security of the principal, interest, and penalty, but without prejudice to the personal bond, and in corroboration thereof, the debtor sold, alienated, and disposed the lands, which were particularly described, to the creditor, and his heirs and assignees, heritably *but redeemably always* in terms of the clause of redemption after inserted, the purpose of the disposition being then declared to be *in real security*, and for payment, of the sums before mentioned.

(4.) An obligation to infeft *a me vel de me*. In order to protect the creditor from the operation of the rule by which the disponee bears the expense of his own infeftment, this clause bore expressly that he should be infeft at the expense of the debtor. If subinfeudation was very rigidly prohibited in the debtor's title, and without the usual exception of power to grant securities, then it was necessary to make the holding *a me* only, and instantly to obtain confirmation from the superior. When the *de me* holding appeared, it was declared to be for a blench duty, and the granter of the security bound himself and his successors to enter the heirs and assignees of the creditor in this holding without composition.

(5.) A clause of warrandice of the disposition under reversion, and warrandice also of the sales which should take place by virtue of the warrant of sale granted in a subsequent part of the deed.

(6.) The assignation to writs and rents, with power to uplift. Under the assignation of writs it is competent, if the author's title fails by objection to his infeftment, to complete the real right of the creditor in the bond by means of the precept of sasine in the debtor's disposition to the property ; *Melvin v. Dakers*, 17th June 1843. See also the case of *Mitchell v. Adam*, which is correctly reported by Lord HAILES, but inaccurately explained in the Dictionary, and also the later case of *Bonthrone v. Bonthrone's Creditors*, 29th May 1805. This clause *quoad* the rents was in conformity with the real nature of the right conferred. It was not intended to be acted upon unless occasion should arise, and, if eventually it became necessary for the creditor to levy the rents, then he entered into possession by action of mailles and duties.

(7.) The clause of registration.

5 D. 1217.

M. 14,335;

1 Hailes, 185.

Hume, 238.

(8.) The precept of sasine, which not only authorized infeftment by the usual mandate to baillies, but comprehended also the debtor's right of reversion, and a power of sale to the creditor. In order to give effect to these respectively, after the warrant of infeftment it was declared, that the lands should be redeemable by the granter and his heirs upon notarial premonition of three months at any term of Whitsunday or Martinmas by payment of the debt, or, in absence of the creditor, by consigning it in a particular bank named, the office of which was declared to be the place of redemption; and it was also declared, that an extract of the bond or of the sasine should be equivalent to a letter of reversion, i.e., that the production of such an extract, which it is always in the power of the debtor to obtain, should be sufficient evidence of the purpose of the consignment to the notary, in whose hands instruments were taken upon the fact. By this clause the expenses of the discharge and renunciation, or of any conveyance of the debt and security, were laid upon the debtor, in opposition, as regards the discharge, to the ordinary rule, which requires the creditor to discharge his debt at his own expense.

On failure to pay within six or within three months after a notarial demand by the creditor, he was empowered to sell by public roup, after previous advertisement during a specified time, and with a fixed number of insertions in newspapers, which were also specified, and for this purpose to enter into articles of roup, and grant dispositions containing the necessary clauses of style, and binding the debtor in absolute warrandice. It was declared, that the purchaser should not be concerned with the application of the price, but that the sales should be as valid as if granted by the party himself. Power was given to prorogue the day of sale, and the debtor bound himself to ratify the sale when made.

(9.) The deed was completed as usual by a testing clause; and the right was perfected by infeftment.

The security thus constituted established in the person of the creditor a preferable real right from the date of recording the sasine, subject only to the inherent burdens affecting the feu. The effect of this real right is practically illustrated by the cases of *Lady Kelhead v. Wallace*, 2d November 1748, where a creditor in an annuity secured by infeftment was preferred to arresters pleading that she had neither a title of possession, nor possession by action of maills and duties; and of *Webster v. Donaldson*, 13th July 1780. Here, infeftment on an heritable bond was held equal to intimation of the assignation of maills and duties, and an heritable creditor was found preferable to an arrester. The effect of the preference created by the creditor's infeftment is shown also in the ultimate diligence against land, an adjudication following upon an heritable security being preferable to an adjudication on a personal debt; and the preference of heritable creditors is sustained over whatever interest the debtor had in the

POWER OF
SALE.EFFECT OF THE
BOND AND DIS-
POSITION IN
SECURITY COM-
PLETED BY IN-
FEFTMENT.
M. 2787.

M. 2902.

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M. 2860.

16 S. 1349.

DISPOSITION IN
SECURITY TO
CAUTIONER.

lands, even although his disposition and sasine be reduced ; *Gillespie's Real Creditors v. His Personal Creditors*, 24th July 1764, a case recognised by Lord CORNHOUSE as of authority.

A disposition in security may be granted not only to a creditor, but also to a cautioner in relief of his obligation, in which case, as the right of relief does not arise until its condition exist, viz., the enforcement of the cautioner's liability, the heritable security in relief does not become a title of possession, until the cautioner pays the debt, or is distressed. The security being granted in this case for the protection not of the creditor, but of the cautioner, the latter may renounce it when he chooses, unless the creditor shall have attached it by adjudication.

SECURITY FOR
FUTURE DEBT.

1696, c. 5.

M. 14,127.

M. 14,118 ;
2 Ross, L. C.
661.54 Geo. III.
c. 137, § 12.7 S. 172 ;
4 Wil. & Sh.
App. 379.NEW FORM OF
BOND AND DIS-
POSITION IN
SECURITY,
UNDER 10 & 11
Vict. c. 50.

When an heritable security is granted for a debt not yet contracted, its effect is restricted to the amount contracted before the date of the sasine, in terms of the Act 1696, cap. 5 ; and it is not good even for that amount, if no sum whatever is specified in the security, according to the principle already stated and illustrated by the case of *Stein's Creditors, supra*. The Act 1696, cap. 5, rendered it impossible to employ heritable property as a fund of credit for cash accounts, as is shown in *Brough's Creditors v. Selby's Heirs*, 12th December 1794, where, under the effect of that Statute, a security was found to be ineffectual, because the balance existing at the date of the infestment was held to have been repaid by subsequent operations, so that the ultimate balance was a future contraction in terms of the Act. This inconvenience was modified, and so far removed, by 54 Geo. III., cap. 137, § 12, which allows heritable property to be impledged in security of future balances upon cash accounts or credits, or for relief to co-obligants, although the advances are posterior to the date of infestment. This security may contain procuratory of resignation and precept of sasine for infesting any bank or bankers, or others giving the credit, or cautioners, provided principal and interest be limited to a definite sum to be specified in the security, such sum not exceeding the amount of principal and three years' interest at 5 per cent. But, when the principal sum is specified "with three years' interest thereon," it has been held sufficient, although the *cumulo* sum was not mentioned ; *Morton v. Hunters & Co.*, 10th December 1828, affirmed on appeal. This security will remain effectual, until the account is closed, the balance discharged, and sasine renounced. The form will be found in the first volume of the Style-book.

The mode of constituting heritable securities by bond and disposition in security is altered by the 10 & 11 Vict., cap. 50, which authorizes an abbreviated form of the deed in terms of a schedule appended to the Act. In effect this form is, with the exceptions which we shall notice, identical with the previous deed, producing the same results by brief conventional clauses, the import of which is fixed by the terms of the Statute to be the same as the detailed clauses formerly

in use. The most important variation is in the dispositive clause, which converts the transmission into an irredeemable right in the event of a sale being made by the creditor in terms of the deed.

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There is no obligation to infest, or procuratory of resignation, or precept of sasine; but the rents and writs are assigned, warrandice granted, power of redemption reserved, an obligation granted for the expense of assigning and discharging the security, and power of sale granted on default in payment, with a consent to registration, the import of which, as we shall presently see, is now very material.

The effect of these clauses is settled by the second and third sections of the Act to be the same as of those in the previous form. With regard to the power of sale, exposure is authorized at Edinburgh, Glasgow, or the County Town or Parliamentary Burgh nearest the subjects, after six weeks' publication in an Edinburgh and local newspaper. Consignation in order to redemption, as well as sales, may be made, notwithstanding the minority or incapacity of the debtor at the time.

Where there are conditions in the title appointed to be inserted, the effect of insertion may be attained by reference to an instrument containing them and already recorded.

The right under the deed in the new form is completed by registration in the general, or particular, or burgh, registers appropriate to lands; and such registration is by the first section declared to be as effectual and operative, as if there had been an obligation to infest *a me vel de me*, procuratory of resignation, and precept of sasine, and, in burgh subjects, an obligation to infest *more burgi* and procuratory, and to be the same as if sasine had been expedite and registered. The registration is regulated, and its effect determined, by the fifth section, which makes the date of entry in the minute-book the date of registration, and declares extracts effectual in all cases except improbation.

RIGHT COM-
PLETED BY
REGISTRATION
WITHOUT SAS-
INE.

Transmission of the security.—Before the year 1845 heritable securities were transmitted, in the same form as feudal rights of property, by disposition, which along with an assignation of the debt contained the formal clauses of transmission at full length, and was followed by infestment.

1. TRANSMIS-
SION *inter
vivos*.

The Act 8 & 9 Vict., cap. 31, greatly simplified the transference of heritable securities. It provided a short form of assignation, containing merely a transference of the security and lands, with a reference to the record of the sasine. This mode of transmission was made available only to a creditor infest, and registration of the assignation in the proper register of sasines completes the conveyance. When the conveyance of an heritable security forms part of another deed, as a marriage contract or trust-deed, it is not necessary to register the whole deed, but a notarial instrument may be expedite and recorded, stating generally the nature of the deed, and setting forth

PROVISIONS OF
8 & 9 Vict.
c. 31. AS TO
TRANSMISSION
OF SECURITIES
BY REGISTERED
ASSIGNATION.

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at full length the part conveying the security. By § 6 of the Act such assignations may be registered at any time, so that it does not appear requisite that registration should take place during the life of the grantee. In all questions under the Bankrupt Statutes, the date of registration is to be held the date of the instrument.

10 & 11 Vict.
c. 50.

The provisions of this Statute are, by the Securities Act of 1847, made applicable to the transmission of securities prepared in the new form, the date of recording the bond and disposition in security being referred to in the assignation in place of the date of the sasine as formerly.

2. TRANSMIS-
SION OF SECU-
RITY *mortis*
causâ.

FORMER PRACTICE.

Under the previous forms the title of an heir to an heritable security required to be made up with the same formality as to an estate of property, and according to the same feudal principles.

If the ancestor was infeft, the heir entered by precept of *clare constat* from the debtor as the immediate superior. If that could not be obtained, then he might resort upon the alternative holding to the superior, and execute the procuratory, or, to avoid the necessity of consolidating two estates, obtain confirmation of the ancestor's infeftment, and precept of *clare constat*, infeftment upon which completed his title. If the ancestor was not infeft, then the heir made up his title by general service and infeftment upon the debtor's warrant in the bond.

FORM OF TRANS-
MISSION UNDER
8 & 9 Vict. c.
31.

The Heritable Securities Act of 1845 introduced a simple mode of entering heirs by writ of acknowledgment from the person duly infeft, of whom the security is held. Registration of this writ vests the full right in the heir to the same effect as it existed in the ancestor himself. The writ of acknowledgment comes in place of the precept of *clare constat* and infeftment. If that writ cannot be obtained, the creditor's heir may complete his title by service, and then without intervention of the superior expedite a notarial instrument, which specifies the security by reference to the record, and attests the fact of the party's right by service. Registration of this instrument vests the full right, and is equivalent to entry with the superior.

INFESTMENT
REQUIRED,
WHEN SECURITY
NOT REGISTERED,
BY 10 & 11
Vict. c. 50,

The Statute of 1847 requires infeftment in favour of the heir, when the bond and disposition in security in the new form has not been registered during the grantee's life. In this case, the deed is declared by § 6 to be a warrant of sasine in favour of the party having right to the bond by service, adjudication, or otherwise. In this particular instance, therefore, there must still be infeftment, the warrants of which will be the bond, and the decree of general service, and in place of the precept, the notary will refer to this clause of the Statute, as giving to the bond the effect of a warrant of sasine. In all other respects transmissions *mortis causâ* of securities created under the Act of 1847 may be made according to the provisions of the Statute 1845.

§ 10.

A simple mode of transference in favour of adjudgers was also

introduced by the Statute of 1845 by registration of the abbreviate of adjudication, which is declared to have the same effect as infestment on a charter of adjudication. It will be kept in mind, that, when one is substituted *nominatim* in an heritable bond upon which the first grantee was infest, service is necessary to transmit the right to the substitute; while it is otherwise in personal bonds; *Livingstone v. Lord Napier*, 9th March 1757, affirmed 11th March 1765.

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CHAPTER I.
TRANSFER
TO ADJUDGE

M. 15,409.
5 Br. Supp.
885; 2 Ross
L. C. 511.

Extinction of the security.—We have already seen, that, as long as the direct and substantive right conferred upon the creditor was infestment in the lands by wadset or by heritable bond for annual-rent, renunciation of the right was necessary to its extinction, and that, when the infestment ceased to be the principal right conferred, and became an accessory merely to the bond, the simple discharge of the debt became an extinction of the security. This is a point in *Woodmass v. Hislop's Trustees*, 28th January 1825. It was indispensable, however, to confidence in the transaction of business, that, when securities were paid, the register should contain evidence of their extinction; and, accordingly, the unvarying practice was to take from the creditor a deed called a discharge and renunciation, which, besides acknowledging payment and discharging the debt, confessed the lands to be lawfully redeemed and loosed and disburdened, and renounced and released them to the debtor. As the creditor could not release the lands, unless he were infest, it was not unusual in the assignation of heritable securities to insert a commission from the granter who was infest authorizing the assignee to renounce, though he should not be infest.

3 S. 476.
DISCHARGE
AND RENUN-
CIATION.

The Act 1845 substituted for the discharge and renunciation a short deed discharging the debt, and declaring the lands redeemed and disburdened; and that is the mode of extinction now practised. The new forms are not necessarily subversive of the old, which in terms of both Statutes may still be used in the establishment, transmission, or extinction of securities; and it will sometimes be the practitioner's duty to avail himself in some measure of the previous forms, especially in cases of complexity.

DISCHARGE
SECURITY UNDER
8 & 9 V.
c. 31.

Having thus exhibited the old and new forms, we shall now advert to points of leading importance for the practitioner's guidance, in order to his own security as well as to that of his client.

POINTS OF
PRACTICAL
IMPORTANCE.

He must first have undoubted authority from his client for any contract of loan before entering into it. The loss and trouble occasioned by the want of a clear understanding between clients and those who act for them are shewn in *Glassford, &c. v. Brown, &c.*, 9 S. 105. 1st December 1830. If the agent be in a position which implies obligation to see to the sufficiency of the security to be impledged,

AUTHORITY
FROM CLIENT

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15 D. 345.

that duty must be discharged with ordinary prudence and discretion. In *Forsyth*, 28th January 1853, a *curator bonis* was found liable to replace £2000, lost by an insufficient security in consequence of his having relied upon a valuation by an inexperienced party without inquiry as to his capability.

DEBTOR'S
TITLE.

He must ascertain that the debtor's title is sufficient. This needs now to be the more anxiously attended to, inasmuch as the brief forms do not bring the feudal requisites of the debtor's right so prominently into view, as when the security contained the clauses at full length. It must be seen to, that the borrower is infest, so as undoubtedly to vest him in the *dominium utile*. In the case of *Strachan v. Whiteford*, 9th February 1776, the borrower's right stood upon missives of sale merely, and the creditor founding on the assignation of writs in his security attempted to cure the defect by adjudging the lands from the granter of the missives. But this was clearly incompetent. The assignation of writs, in so far as carrying the missives to the creditor, conveyed them only under the qualification, and for the purpose of the deed, viz., as a security, and in order to enable the creditor to vindicate his author's right against other parties seeking to disturb him in the possession of the rents. The creditor, therefore, did not hold the missives by a title authorizing him to obtain direct adjudication of the lands to himself. He ought first as a creditor to have adjudged his debtor's personal right to the lands, which would have vested him in the redeemable right of the property of the lands, and so entitled him as in place of the debtor to sue the granter of the missive for implement. The security was reduced at the instance of a trustee for the debtor's creditors, who had himself made up a title by adjudication in implement.

SECURITY
GRANTED BY
FACTOR AND
COMMISSIONER.

An heritable security may be granted by a party authorized, as by a factor and commissioner under special powers; and, in disposing to one party, power may be granted to a different party to burden the estate by heritable security. This results from the *plenum dominium* of the disponent qualifying the disponent's right by the faculty reserved to another; *Anderson v. Young and Trotter*, 24th December 1784.

M. 4128.

SECURITY,
WHEN DEBTOR
INFEST *a me*.

If the debtor is infest *a me* without confirmation, then it is obvious that he cannot give a warrant affecting the *dominium utile*, because he is not himself vested in it. This is a point as essential now as ever; and the doctrines formerly delivered regarding the effect of confirmation are here precisely applicable. In the case of several securities flowing from a person holding *a me*, the benefit of his subsequent confirmation will accresce first to the sasine which would have prevailed if the granter had been confirmed at the date of his own infestment. Of this there is a remarkable and instructive example in *Henderson v. Campbell*, 5th July 1821. The decision is unfor-

1 S. 103.

tunately very briefly reported, and the session papers may be referred to with advantage. A. infeft *a me* granted an heritable security with precept *a me* to B., on which sasine followed. Afterwards, A. granted an heritable security to C. with precept *a me*, upon which C. was infeft, and obtained from the superior confirmation of his own bond and infeftment, but not of A.'s title. Thereafter, B. obtained confirmation in favour of himself of A.'s title, and of his own bond and sasine; but it was decided, that the confirmation of the title accresced first to the infeftment of C., which had been previously confirmed. The principle of the decision is, that by the confirmation A.'s right was made valid from the date of the sasine confirmed. Assuming then the validity of A.'s sasine from its date, C.'s right was necessarily preferable, because first confirmed after the author's. It made no difference, that B. confirmed both A.'s right and his own at once. Confirmations of separate rights are distinct acts, and the moment A.'s right was confirmed it accresced first to his disponee first confirmed. The case of *Henderson* shows distinctly the necessity of looking to the feudal nature not only of the borrower's right, but of that received from him in favour of the lender. If a warrant for a public holding is taken, then the creditor may be excluded by a subsequent base right or public right first confirmed. The new forms obviate the risk of this in ordinary cases, but it is necessary to advert to it as affecting old securities. This was a frequent error some years since; *Leslie v. M'Indoe's Trustees*, 21st May 1824; *Rowand v. Campbells*, 30th June 1824. In the latter case a plea of *communis error* was disregarded by the Court, and subsequently by the House of Lords; *Stevenson v. Rowand*, 14th July 1830. Here, a law agent was held liable to his client for having taken an *a me* right, and neglected to get it confirmed; and that liability attaches, whether he is employed by the debtor or the creditor; *Lang v. Struthers, &c.*, 28th May 1827. There are various other cases. That of *Peebles v. Watson*, 9th December 1825, is an example of an *a me* security defeated by the right of the trustee in a sequestration.

We have found elsewhere that a personal title may be assigned so as to give a qualified right to the assignee. So, one having right to an unexecuted precept in an absolute disposition may assign it so as to give the assignee a liferent or other security by infeftment; *Mitchell v. Adam*, 17th July 1767; *Bonthrone v. Bonthrone's Creditors*, 29th May 1805. In *Melvin v. Dakers*, 17th June 1843, the holder of an heritable security, having ascertained that the granter's sasine had not been recorded, took infeftment anew upon a precept in the radical title, (unexhausted by the failure of the debtor's sasine,) claiming right so to use this precept by virtue of the assignation of writs in the titles and in the heritable security; and this was held to validate the security.

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Stair, ii. 3, 38.
Ersk. Inst. ii.
7-15.

3 S. 48.
3 S. 196.
4 Wil. & Sh.
App. 177.

2 Wil. & Sh.
App. 563.

4 S. 290.

PRECEPT IN
ABSOLUTE DIS-
POSITION MAY
BE ASSIGNED
qualified.
Hailes, 185.
Hume, 241.
5 D. 1217;
2 Ross, L. C.
424.

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The practitioner must ascertain also, that the lands are not already mortgaged. This must be done with the same care as in a sale, according to the rules to be afterwards explained, and the agent is liable for failure in this duty; *Graham, &c. v. Hunter's Trustees*, 4th March 1831.

In preparing the security we must keep in view the principle already referred to, that land cannot be burdened indefinitely. Both the sum, therefore, and the creditor's name, must be distinctly set forth. In *Tod v. Dunlop*, 13th December 1838, an heritable bond having been conveyed in security of certain acceptances, the transference was held to be ineffectual, because the bills were described by their date, but not by their amount, and so it was held a security for an indefinite sum.

The quality of the right as redeemable must clearly appear. In *Hadden v. Weavers of Haddington*, 22d February 1814, a confused deed, bearing partly to be a security, and partly a disposition, was held to constitute an irredeemable conveyance. Questions of difficulty arise, when the ordinary practice of each party employing his own agent is not acted upon. Thus, in *Macintosh v. Pitcairn*, 16th December 1851, the same agent was employed by borrower and lender, and he failed after receiving the whole loan from the lender, not having paid the full amount to the borrower. The loss was held to attach to the party reposing the confidence which had been abused. The money having been paid to the agent after the bond was in his hands, that kept the lender *indemnitas*. The borrower, having given bond for the whole without taking care to get the entire sum out of the agent's hands, suffered the loss. When a security is prepared upon the borrower's instructions by his own agent in favour of a stranger, the agent is liable to the lender for loss by failure in duty; *Struthers v. Lang*, 2d February 1826.

The competency and effect of the power of sale under the old heritable security is not doubtful. In *Ogilvy v. Cromby*, 18th February 1804, a power, upon failure of payment, to sell after previous advertisement through the town of Montrose by beat of drum once a fortnight for six weeks, was sustained; and, in *Robertson v. Paton*, 23d May 1815, power to sell upon premonition by letter only was held to be validly exercised, a resort to the Sheriff in the procedure being approved of, though unnecessary. Finally, in *Dunlop v. Marshall*, 19th January 1821, the Court observed, that, if any doubts regarding the efficiency of powers of sale in heritable securities were entertained, they were ill-founded, and would not allow a sale under such a power to be stopped by a process of ranking and sale. It is not settled, whether power to sell is a necessary and inherent part of an heritable security, and a *curator bonis*, specially empowered to borrow money, and grant security over his ward's heritable estate, having

executed a bond and disposition in security in the ordinary form, the Court passed a note to try the question, whether power of sale granted by the curator was valid; *Stewart v. Kirkaldy*, 14th November 1849. But the power must not be exercised with a reckless disregard to the interests of other parties, as, *e. g.* exposing at a season when there is no likelihood of purchasers. In *Kerr v. Macarthur's Trustees*, 23d December 1848, the Court interfered to prevent exposure at an inadequate price, and while an action of reduction of the debtor's title was in dependence. It is indispensable to the validity of a sale, that the procedure be in precise conformity with the powers granted in the deed, or, in securities granted under the Act 1847, in conformity with its requirements as to advertising, &c. We have already had occasion to observe the stringency with which observance of statutory requirements of this description is enforced, and rigid accuracy must be the rule. In *Dickson v. Magistrates of Dumfries*, 15th January 1831, the advertisements previous to the first exposure having been inaccurate, a full series of advertisements as for a first exposure was made before the adjourned exposure, and that was sustained as sufficient. The proceedings must be regular, and such as to afford fair protection to the debtor's rights. In *Jeffray v. Aiken*, 16th June 1826, the creditor having acted as auctioneer, and purchased for himself, the sale was reduced after twelve years' acquiescence; and, in *Taylor v. Watson*, 20th January 1846, it was again held unlawful for a creditor to purchase subjects exposed by himself under powers in his own bond. We have seen, that under the Bankruptcy Acts purchase by an heritable creditor, although consenting to the sale, is allowed.

5. *Disposition with back-bond.*

In modern practice we have a security similar in form and effect to those of the original wadset, viz, disposition and back-bond. The disposition is *ex facie* absolute, and, therefore, confers an apparently absolute right of property. But the creditor grants a back-bond, declaring the true purpose of the disposition, and binding himself to denude on payment of the debt. The debtor after granting an absolute disposition is not in safety without obtaining a back-bond, because, when a conveyance is *ex facie* absolute, it can be proved to be in trust only by the writ or oath of the disponent. This is provided by the second part of the Act 1696, cap. 25. See *Knox v. Martin*, 12th February 1850.*

* See also the case of *Seth v. Hain*, 14th July 1855, in which it was observed from the Bench, that the strong words of the Statute, 1696, c. 25, have been to some extent modified, and "that it is now fixed law, that the words, 'a declaration or back-bond of trust,' which are 'to be lawfully subscribed by the person alleged to be the trustee,' do not imply that a probative deed is necessary; and that, on the contrary, a trust may be competently proved by writings under the hand of the party, importing an admission or acknowledgment."

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OBLIGATION TO
DENUDE MADE
REAL BY REGIS-
TRATION OR
JUDICIAL PRO-
DUCTION OF
BACK-BOND.

M. 1163; and
Bell's Fol.
Cases, 234;
2 Ross, L. C.
723.

M. 1154;
2 Ross, L. C.
721.

12 D. 1047.

F. C.

EXTINCTION OF
SECURITY.

13 D. 912.

1 Macq.
App. 358.

The obligation to denude is made a real limitation of the right by registration of the back-bond in the record of sasines and reversions; and after such registration, therefore, the disposition, though absolute, cannot be used as a security for a greater amount than is specified in the back-bond. The same effect is produced by the judicial production of the back-bond, whereby it is established, that the disponee has only a qualified right of property; and the use of the disposition as a security for further sums, after its purpose is thus divulged, brings it within the operation of the Act 1696 as a security for a future debt; *Keith v. Maxwell*, 8th July 1795. But, so long as the right is not restricted by registration, or other publication of its qualified nature, it remains a security for all debts owing to the disponee at whatsoever time contracted; *Riddel v. Niblie's Creditors*, 16th February 1782. On the other hand, if the back-bond is not registered, the creditor is exposed to the risk of liability to the superior as owner; and so, in *Clark v. City of Glasgow Life Assurance Co.*, 20th June 1850, a party holding an absolute disposition qualified by a back-bond not registered was found liable on destruction of the premises by fire for £800 in terms of the conditions of feu. We have already seen in the case of *Bartlett v. Buchanan*, 21st February 1811, that the debtor by granting a disposition for this purpose is not so divested as to exclude the claim of terce.

Where the back-bond is recorded so as to establish the nature of this right as a security merely, it may be extinguished by renunciation. But, whether it is recorded or not, the right is most conveniently and satisfactorily extinguished by resignation *ad remanentiam*.

In the case of *Gardyne v. The Royal Bank*, 8th March 1851, there was a contract conveying certain burgage property burdened with a ground-annual. Duff, the disponee, as a security for money granted a conveyance *ex facie* absolute to the Royal Bank, who granted a back-bond, which was recorded. Duff having become insolvent, Gardyne, his author, sued the Royal Bank as liable for the ground-annual in room of Duff, and the Court of Session sustained the claim; but the House of Lords, following the principle observed in deciding *Millar v. Small*, already noticed, reversed this decision likewise; *Royal Bank v. Gardyne*, 13th May 1853, holding here also, that Duff and

"ment of a trust, as, *e. g.*, by a holograph writing signed by him, or by a writing to which his signature is adhibited, if its authenticity is not disputed, or shall be instructed. And not only so, but the fact of the existence of a trust may also be competently established by the tenor of several writings taken together; and this, although there may be, in terms, no positive declaration of trust, or direct expressions of that import. But then, while that latitude has been allowed, it has never been so, except with the restriction and limitation, (and a most necessary one,) that the contents of the writings shall, although not in direct words, amount to an unambiguous acknowledgment of the existence of a trust, or shall be such as not to be capable of being explained in any other way than as an admission that the party holds in trust. *They must be perfectly unequivocal.*"

his heirs were personally bound *in perpetuum* for the ground-annual, but that his assignee was not bound, although the ground-annual continues to burden the estate into whose hands soever it falls.

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6. *Trust-disposition for payment of creditors.*

A comprehensive security is created by disposition to a trustee or trustees, together or in succession, for payment of the truster's debts. Of this deed there is a form in Juridical Styles. It proceeds upon a narrative of the granter's debts. He disposes his lands to trustees named, with powers to sell, to manage, and appoint factors, to compound and submit, and sue, and to assume into the benefit of the trust other creditors besides those named. There is a clause preserving legal preferences in the creditors as well as objections to their claims. The trustees are directed to apply the proceeds in payment of the creditors according to their rights and preferences, and to account for the residue to the truster or his heirs. Other conditions are inserted for expediting and preserving the trust. There is an obligation to infeft, and other clauses requisite to complete a feudal title in the trustees.

On the other hand, the creditors execute a deed of accession, approving of the trust arrangement, and consenting to it; and, when there is a professional trustee capable of judging of questions regarding the creditors' rights, there is inserted in the deed of accession a submission to him of all questions touching their claims *inter se*, or between them or any of them and the truster.

DEED OF AC-
CESSION.

It is only acceding creditors who are bound by the trust arrangement, but they are bound by it; and, as the truster is denuded by the trustee's infeftment, the trust arrangement is not subject to disturbance, every creditor being debarred by his accession from taking separate measures. So, where a trustee had died, it was found incompetent for a creditor to take separate steps, there being power to substitute a new trustee; *Hamilton v. Littlejohn*, 18th March 1836, reversing the decision in the Court of Session.

CREDITORS
BOUND BY AC-
CESSION.

An important question as to the vesting of a trust arose in the case of *Paul v. Boyd*, 2d January 1833, where, trustees having been appointed in succession, sasine in favour of the whole *nominatim*, or of such of them as should accept, was held good as to those first called, the attorney's authority as regarded them being presumed from his holding the disposition. There was no occasion to determine the question as to the effect of the attempt to infeft the others conditionally on their acceptance.

EFFECT OF SAS-
INE TO TRUS-
TEES IN SUC-
CESSION.
11 S. 292.

The trustee thus vested, although infeft for a qualified purpose, may exercise rights of proprietorship; so he was held entitled to sue declarator of non-entry in *Ker v. Russell*, 7th December 1838. When he is in advance for the trust, he is entitled to sell for his own reimbursement, if no immediate means of relief be shown; *Innes v. Innes*, 18th

TRUSTEE
LIABLE AS
VASSAL.
1 D. 179.

7 S. 206.

PART III. December 1828. On the other hand, a trustee, by taking infestment
 CHAPTER IV. and drawing the rents, adopts the feu, and becomes personally liable
 for implement of the obligations in the charter; *Marquis of Abercorn*
 14 S. 168. v. *Grieve*, 16th December 1835.

The trustee and his heirs are accountable to the creditors. This
 was held even in a case where exemption from such accountability
 M. 16,201. was provided by the terms of the deed; *Duke of Hamilton's Creditors*
 Cr. & St. App. v. *The Trustees of the Duchess*, 24th November 1747, affirmed 16th
 447. January 1750.

With regard to the effect of the trust-disposition upon the creditors'
 rights, their interest is a *jus crediti* to call the trustees to account,
 and whatever may be due to them, therefore, is attachable by arrest-
 M. 759. ment; *Grierson v. Ramsay*, 15th February 1780.

After the purposes of the trust are accomplished, the trustee is ac-
 countable for any reversion to the truster, and must denude in his
 favour.

RADICAL RIGHT
 REMAINS WITH
 BENEFICIARY,
 WHERE TRUST
 FLOWS FROM
 HIM.

M. voce "Adju-
 "dication,"
 Appx. No. 11;
 1 Ross, L. C.
 458.

7 Wil. & Sh.
 App. 441.
 6 S. 77.

It is carefully to be observed, however, that a trust-disposition
 for payment of creditors does not divest the debtor of the radical
 right of property. Upon its face it is shown not to confer on the
 trustee an absolute right. It is a security, and may be extinguished
 by renunciation. This doctrine was first recognised in *Campbell v.*
Edderline, 14th January 1801. There, a party who had granted a
 trust-disposition for creditors, with instructions to the trustee to exe-
 cute an entail, was held not to be so divested, but that non-acceding
 creditors might adjudge the property from his apparent heir. The
 same doctrine was held by the House of Lords in *MacMillan v. Camp-*
bell, 14th August 1834; and, in *M'Leod v. M'Kenzie*, 17th November
 1827, the existence of a trust was held no bar to a conveyance of the
 radical right of property. It is necessary to keep in view, however,
 that the doctrine of the radical right of property being in the benefi-
 ciary is necessarily limited to the case where the trust has flowed
 from him. It can have no place, when he has had no title antecedent
 to the trust.

Vide 6 D. 804.
 Inst. ii. 2, 15.

The doctrine of Erskine, that the conveyance of land to a trustee
 for behoof of creditors makes the debts due to them heritable, though
 originally moveable, has been corrected in a note by Lord IVORY, and
 is to be received as accurate only where the conveyance either is to
 the creditor himself, or is so conceived as to give to the creditor with
 his own concurrence a real right in the estate. This is distinctly and
 strongly illustrated by the case of *Hawkins v. Hawkins*, 23d May
 1843, where personal bonds were held moveable, although they had
 been secured by a conveyance of lands to trustees more than forty
 years.

5 D. 1035.

II. LEASES.

PART III.

CHAPTER IV.
DEFINITION OF
LEASE.

A tack or lease is a contract, by which the use of land is granted by the proprietor to another for a fixed yearly rent. The rent may either be in money or in grain or in the converted value of a specified quantity of grain. It may also consist partly or wholly in personal services, such as are now lawful.

As a right relating to lands, this contract should be in writing. A verbal tack for a term of years, though admitted to have been contracted, may be resiled from by either party, and, even if possession has followed, it may be resiled from at the end of any year; *Keith v. M.* 8400. *Johnston's Tenants*, 16th July 1636; *Neill v. Earl of Cassilis*, 22d November 1810. But extraordinary *rei interventus*, as the payment of a grassum, will support a verbal lease for a term of years. Ordinary improvements, however, are not allowed to produce that effect; *Macrorie v. M'Whirter and Gray*, 18th December 1810.

EFFECT OF
VERBAL LEASE.

F. C.

A written obligation effectually secures the right to a lease, and, where the writing is defective, *e.g.* a lease signed only by one party, it is effectual if followed by possession; *Macpherson v. Macpherson & Clark*, 12th May 1815; and the previous case of *Countess of Moray v. Stewart, &c.*, decided in the House of Lords, 24th March 1773.

F. C.

The improvement of agriculture, and the interest of the tenant, evidently required that his possession should be secure, and that he should not be dependent upon the pleasure either of his landlord, or of any purchaser of the estate. In Tytler's History of Scotland reference is made to the hardships suffered by tenants and labourers in being turned out of their farms and cottages when the estate was sold. This led to intercession on the part of James I. with his prelates and barons on behalf of husbandmen holding leases; and, in 1449, a Statute was passed, cap. 18, entitling tenants with tacks to continue possession after sale of the estate until the issue of their tacks, paying to the purchaser the rent fixed by the tack. This Act has been characterized as the *Magna Charta* of Scotch agriculturists.

POSITION OF
TENANTS BE-
FORE 1449,
c. 18.

To entitle a lease to the benefit of this enactment, three things are requisite:—

REQUISITES OF
LEASES UNDER
1449, c. 18.

(1.) That it contain a specific rent, without which it does not fall within the terms of the Statute; and, in order to be effectual against singular successors, the rent must not be elusory.

1. AS TO RENT.

(2.) That it be followed by possession as in room of sasine, tacks having anciently been constituted by charter and sasine. Although the lease is executed, yet, if the granter die before the term of entry, it is void. A decision inconsistent with this doctrine, *Redhead v. Kerr*, 27th November 1792, was reversed on appeal. A lease of game, although followed by possession, is not effectual against singular successors; *Pollock, Gilmour, & Co. v. Harvey*, 5th June 1828. The

2. AS TO POS-
SESSION.Bell's 8vo
Cases, 202.

6 S. 918.

PART III. CHAPTER IV. 3. AS TO ISE.	grounds of this decision are clearly stated in Lord COREHOUSE's interlocutor.
M. 15,196. M. 15,181.	(3.) The lease must contain a definite ish. If it does not, although binding upon the granter and his heirs, it is good against singular successors only for the shortest period consistent with the expressed intention; so, where annual services constituted the rent, the lease was sustained for two years; <i>Redpath v. White</i> , 22d November 1737. The Statute supports leases of urban tenements as well as of lands; <i>Macarthur v. Simpson</i> , 6th July 1804.
LEASE NOT ASSIGNABLE WITHOUT CON- SENT.	The right of the singular successor entitles him to payment of the rent, and he is not debarred from this by stipulation of retention by the lessee himself, or for payment to another creditor of the landlord.
IMPLIED POWER TO ASSIGN. POWER TO SUBLET.	The landlord has a <i>delectus personæ</i> , and the tack cannot, therefore, be assigned without the landlord's consent, unless granted expressly in favour of the tenant and his assignees. It may, however, be transmitted by adjudication, unless assignees are expressly excluded. But, when a lease is for a period beyond the ordinary duration, a power of assignment is implied, as it is also in a liferent tack. The same principle applies to subletting. These are the rules in agricultural leases. In tacks of urban tenements there is an implied power of assignment and subletting, unless expressly excluded; <i>Anderson v. Alexander, &c.</i> , 10th July 1811, and previous case of <i>Aitchison</i> there referred to. But the sublease must not be for an objectionably different use of the subjects. There is this distinction between assignation and sublease, that in a sublease the right of the tenant continues, and his liability, therefore, continues also, both he and the subtenant being liable for the rent; while, after an assignation has been assented to by the landlord, he has no longer any claim against the original tenant; <i>Skene v. Greenhill</i> , 20th May 1825, and previous case of <i>Low</i> there referred to, in opposition to the doctrine of Erskine and Bankton.
F. C.	In agricultural leases the tenant, receiving the houses, &c., in good repair at his entry, is bound to maintain them in the like condition. The rule is different in urban subjects, which the proprietor must keep in a tenantable condition.
4 S. 25.	Tacks may be terminated during their currency, (1.) by failure to pay rent for two years, this irritancy, however, being purgeable at the bar; <i>Act of Sederunt</i> , 14th December 1756; (2.) under the same Act, by the tenant's failure to find security for arrears, and for five years' rents, where he is either a year in arrear with his rent, or has failed to till at the usual season; (3.) also at any time by renunciation granted and accepted.
TACKS, HOW TERMINABLE DURING CURRENCY.	A stipulation annulling the tack in the event of the tenant's bankruptcy is effectual; <i>Forbes v. Duncan</i> , 2d June 1812.
F. C. PROCEDURE WITH VIEW TO REMOVING.	In order to insure the tenant's removal at the termination of the lease, certain formalities of warning and citation are requisite, which

are described in the different Institutional works. The form used, (excepting within burgh, where chalking the door upon the verbal mandate of the proprietor suffices,) consists in a summons of removing before the Judge Ordinary, executed and called forty days before the term of expiration of the lease. After decree, removing may be effected upon a precept from the Sheriff within forty-eight hours. When the lease contains an obligation to remove without warning, it is made effectual by a charge upon the registered tack forty days before the term. The Sheriff on production of the tack and horning will eject the tenant within six days. A letter containing an obligation to remove is equivalent to a decree of removal in terms of the lease, and, the lease being stamped, the letter is regarded as part of the contract, and held, therefore, not to require a stamp; *Bain v. Stewart*, 14th July 1852. The rules of compulsory removal now stated have been made matter of Statutory enactment in the Sheriff Court Act, 16 & 17 Vict. cap. 80, §§ 29, 30, and 31.

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CHAPTER IV.
14 D. 1007.

When there is no warning, or process of removal, the subject is held to be relet by tacit relocation for another year.

TACIT RELOCATION.

We will not enter upon the nature of the landlord's preference for his rent by hypothec over the fruits and *invecta et illata*, or the steps necessary to enforce it, and the periods within which these steps must be taken, these points being appropriate to the Chair of Scots Law.

A precedent of the tack in its most simple form will be found in the Juridical Styles.

FORM OF
LEASE.
I. 672, 3^d Edⁿ.

The landlord sets, and in tack and assignation lets, to the tenant and his heirs the lands or other subjects, which are described, for a specified number of years from the term of Whitsunday as to houses, grass, and pasturage, and from the separation of the crop of the year from the ground as to the arable land. Where no term of entry is mentioned, it is held to be the next term after the date of the tack. The possession is fortified by the proprietor's absolute warranty. On the other hand, the tacksman binds and obliges himself to pay the rent half-yearly with interest, and penalty, and to flit and evacuate the premises at the expiration without warning or process of removal. Then there is a mutual penalty for non-implement, and a clause of registration.

These are the main and essential conditions of a lease. Among the Styles will be found forms applicable to a great variety of circumstances in the granter, the nature of the subject, and the intended use of it.

We shall notice a few points of chief importance:—

We must look to the title of the granter. A lease from a person not infeft is not effectual against a singular successor infeft; *Gordon v. Milne*, 29th February 1780. A liferenter cannot grant a lease *M. 10,309.*

TITLE OF
GRANTER OF
LEASE.

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F. C.

M. voce

"Tack," App.
No. 15.

USE OF LEASE
AS A SECURITY.

2 S. 52.

3 Wil. & Sh.
App. 75.

8 S. 647.

5 Wil. & Sh.
App. 476.

4 D. 405.

1. To HEIRS.

M. 14,375.

M. 14,375.

5 Br. Supp.
814.

TRANSMISSION
inter vivos.

beyond his life; nor tutors beyond their tutory. The restrictions upon the powers of heirs of entail in this respect have already been examined. Upon deathbed a tack injurious to the heir cannot be granted, but one given under a fair exercise of the right of administration is valid; *Semple v. Semple*, 1st June 1813.

A mercantile company is capable of holding a lease *socio nomine*; *Denniston, Macnayr, & Co. v. Macfarlane*, 16th February 1808.

Very important questions have arisen with regard to the use of leases as a ground of credit, the difficulty here being to impart to the creditor a title of possession, there being no medium for giving him a real right otherwise than by possession, as may be done in a feudal estate by means of the records. The question received very careful and deliberate consideration in *Brock v. Cabbell*, 29th November 1822; remitted, 13th May 1828; adhered to, 5th March 1830; affirmed, 23d September 1831. Here, a tenant in security of a loan granted an assignation of his lease, which was intimated to the landlord. The assignee granted a sublease to the tenant, who remained in possession and paid the rent to the landlord, no possession being taken by the creditor. The judgment was founded upon the principle inherent in the Law of Scotland, that a real right cannot be transmitted without a change of possession natural or civil, and that the case resolved itself into a collusive device to create a latent security over a real right without change of possession either naturally, civilly, or symbolically—an attempt at variance with the first principles of the Law of Scotland, and which, if successful, would give rise to mischievous consequences. The extremely unsatisfactory and dangerous nature of such securities is strikingly shewn in the case of *Ramsay v. Commercial Bank*, 20th January 1842, where a lease was assigned as a security, the landlord consenting, and the assignee binding himself for payment of the rent. The tenant (debtor) having become bankrupt, the trustee challenged the assignation as void for want of possession. The creditor found it prudent not to defend his right, and proposed to relinquish all connexion with the lease. But the landlord contended successfully that he remained permanently liable for the rent.

Transmission of lease.—A lease is an heritable right, as having a tract of future time. It, therefore, descends to the heir-at-law, and it vests in him *ipso jure* without service; *Boyd v. Sinclair*, 17th June 1761. An adjudger from the heir, therefore, does not need to charge him to enter in special. The heir's title is active, and he can assign; *Campbell v. Cunninghame*, 16th February 1739. He can also reduce an assignation improperly granted by the tenant; — v. —, 26th June 1754.

Assignation is the proper form of transmission of a lease, although it is heritable as to succession; and the assignation is effectual, although

not containing dispositive words; *per* Lord MONCREIFF in *Blair v. Blair*, 14th November 1849.

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12 D. 114.

III.—LIFERENTS.

After what we have already observed, it is unnecessary to enter into any detail upon the subject of liferents. We have seen, that this is a right to the enjoyment during life of the fruits of the soil, and that it must be exercised *salvâ rei substantiâ*.

Liferents are reserved or constituted. Where the right exists by reservation, upon the principle of reluctance to presume intention on the part of the fiar to divest himself of the substantial rights of the fee, the liferenter by a continuation of his rights as fiar is entitled to enter vassals and to receive the casualties.

The liferent by constitution is established by sasine, examples of which we have had in treating of the marriage contract. Strictly speaking, this right in its proper character is intransmissible—*Ossibus usufructuarii inheret*. When assigned, therefore, it consists of a personal right to the fruits during the cedent's life. This right does not admit of sasine in the assignee. A liferent after its constitution, therefore, is conveyed by assignation intimated to the fiar and to the tenants. This intimation is good, though made before the period at which the assignee's right is to commence; *Flowerdew v. Buchan*, 5th 13 S. 615. March 1835.

The intransmissibility by feudal form of liferents is practically inconvenient, when the liferenter desires to impledge his right as a fund of credit. The more so, as by the authority of Erskine, combined with that of Stair, the doctrine appears to be extended to liferent annuities, and may be held, therefore, to include securities for liferent provisions granted to husband or wife under Lord Aberdeen's Act, or in the exercise of other powers; so that annuities so constituted may be held not to be capable of assignment so as to give a feudally complete right to the assignee. It is not, however, held to be quite clear, that the rule applies to such heritable annuities, and, where they are assigned, it will be prudent, besides intimating to the tenants, which is inconvenient, because it must be renewed at each change of occupation, to take a warrant and infeftment, *valeant quantum*.

IV.—SERVITUDES.

It is not necessary to enter upon a minute exposition on the subject of servitudes. On this point we may refer to the principles already developed in treating of conditions and qualities affecting the feu. Of special rights of servitude, and the form and mode of their imposition, there are examples in the Style-book.

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CHAPTER V.

DILIGENCE AFFECTING HERITABLE RIGHTS—INHIBITION—ADJUDICATION—
POINDING THE GROUND.

I.—INHIBITION.

NATURE AND
GROUNDS OF
INHIBITION.

THIS is a preventive diligence, used in order to debar a debtor from alienating his heritable property so as to prevent his creditors from recovering payment out of it. It may proceed either upon a liquid obligation, as a registered protest or other decree, or upon a depending action, the summons being previously executed, or upon a debt not yet payable, when the debtor is *vergens ad inopiam*.

FORM.
iii. 526.

The form of inhibition on a registered protest is given in the Style-book. It consists of signed letters addressed to messengers-at-arms, narrating the ground of debt, and that the debtor intends to put away, or burden, his heritage to the prejudice of the complainer. The writ then (1.) directs him to be charged not to do so, and to do nothing whereby his heritable property may be evicted, or he denuded of it; and (2.) directs the messenger to charge the lieges not to purchase the debtor's lands or receive from him any deed of alienation or security, with certification that deeds taken in disobedience of the charge shall be null.

EXECUTION OF
INHIBITION.

This writ must be executed against the debtor. The execution against the lieges is by publication at the market cross of the head burgh of the jurisdiction of the debtor's domicile, where it must be made, whether the execution against the debtor takes place at his residence or not; *Creditors of Kinminnity v. Innes*, 2d December 1748. Publication at the head burgh of a jurisdiction where the debtor is residing, but without having acquired a complete domicile, is invalid; *Low v. Jeurwine*, 10th March 1815. In cases of doubt, publication ought to be made within both jurisdictions.

1597, c. 268.

M. 6982.

F. C.

WHEN DEBTOR
FURTH OF SCOT-
LAND.

When the debtor is furth of Scotland, the former practice was to inhibit him at the market cross of Edinburgh, and pier and shore of Leith, and the publication to the lieges was at the same places. Now, service as against a debtor furth of Scotland must be made at the office of the keeper of edictal citations, as in place of the record office of the keeper of the records. The lieges, however, not being

further of Scotland, cannot strictly be held to be included in this execution, so it is usual in practice still to publish at the market cross, pier, and shore, even where there is edictal service. PART III.
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The execution and publication must be in terms of the warrant, and, therefore, the letters ought to be prepared, and adapted to the circumstances, with great care.

Besides execution and publication, the inhibition must be registered in the general register of inhibitions, or in the particular register for every county wherein the lands lie, as well as for the county of the debtor's domicile. If the latter is omitted, registration in the particular register of the lands is unavailing. REGISTRATION.
1581, c. 119,
and 1600, c. 13.

Registration within forty days makes the diligence effectual from the date of publication. It was formerly the practice to register inhibitions in a curtailed form, condensing and abbreviating the terms in the entry upon the register, and, on the ground of this practice being general, such registration was sustained as effectual in *Henry v. Pearson*, 9th March 1838. EFFECT OF RE-
GISTRATION.
16 S. 827.

As the object of registration is to give notice to the lieges of the claims of the user of the diligence, material error in the registration is fatal. In *Park v. Wood's Trustees*, 10th July 1838, the omission of two of three names of parties inhibited in the minute-book was held a nullity of the diligence as against these parties, and the keeper of the register was found liable on the ground of defective registration. An example of error in recording the sum proving fatal occurs in *Malcolm v. Northern Reversion Co.*, 26th March 1849, and *Cooke v. Falconer's Representatives*, 26th November 1850. Misnomer of one of several co-obligants in a bond, "James" instead of "David," was held fatal, although the inhibition was not used against him; *Walker v. Hunter*, 17th December 1853. In the same case, the bond was described by only one of several dates. It was observed on the bond, without deciding as to the effect of this, that the means of identification were thus narrowed. 16 S. 1363.
6 Bell's App.
359.
13 D. 158.
16 D. 226.

Inhibition, though formerly the style referred to moveables, is limited in its effect to the heritable estate. And the debtor is restrained by it from alienations or contractions of debt affecting his heritage to the inhibitor's prejudice. The diligence affects *acquirenda*, as well as the property presently belonging to the debtor; *Eleis v. Keith*, 15th December 1665; provided the subsequent acquisition is in a county where the diligence was registered, if it be not recorded in the general register. EFFECT OF
DILIGENCE OF
INHIBITION.

But inhibition cannot restrain the debtor from executing deeds which he was under a previous obligation to grant, *e.g.*, a disposition in implement of missives of sale anterior to the inhibition. Nor does it restrain him from receiving and discharging heritable securities belonging to him, as he may be compelled to grant a discharge; DEBTOR MAY
GRANT DEEDS
FOR WHICH
PREVIOUSLY
BOUND.

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CHAPTER V.

DEBTOR'S
LANDS MAY BE
ADJUDGED FOR
DEBTS PREVIOUS
TO INHIBITION.

INHIBITION
MERELY PRO-
HIBITORY.

but for this a remedy is provided by Act of Sederunt, 19th February 1680, which debars debtors from receiving renunciations of securities, provided the inhibition be notorially intimated to them. Upon the same principle which allows deeds founded upon prior obligations, the debtor's lands may be adjudged for debts contracted previously to the inhibition. The prohibition is personal to the party inhibited, and has no effect in debarring his heir from alienating.

The effect of inhibition is simply prohibitory. It gives no direct right in the property. In order, therefore, to secure an active preference for his debt, the inhibitor must use the diligence of adjudication, which is proper to that object. But, inasmuch as the benefit of the diligence belongs only to the inhibitor, it secures to him important advantages. As regards prior personal debts, if a future real burden on the lands is created, these personal debts are thereby defeated, while the right of the inhibitor remains to have the subsequent burden reduced as in fraud of his diligence.

This diligence does not prevent the transference of the estate to the trustee in a sequestration, under the Bankrupt Act.

RECALL OF IN-
HIBITION.

Inhibition used in an unnecessary or oppressive manner will be recalled by the Court of Session.

10 D. 1512.

As this is an instrument of diligence inimical to the claims of competing creditors, integrity is required with great jealousy. In *Burleigh, &c., v. Horwood*, 20th July 1848, it was held a fatal objection to inhibition against a party abroad, that in the warrant to cite edictally the name of the office was written on an erasure. In the case of *Walker*, already cited, there will be found a discrimination by the Lord President of the rules applied in the construction of deeds as contracts and as grounds of diligence.

16 D. 226.

II.—ADJUDICATION.

DEFINITION.

Adjudication is the diligence by which a creditor transfers the heritable property of his debtor to himself in payment or for security of his debt. It is competent so long as the property remains vested in the debtor, or subject to his disposal. Therefore, the creation of a Parliamentary trust for the sale of lands at the requisition of the heir, in order to pay debts, is no bar to adjudication; *Meiklam v. Glassford*, 4th December 1851.

14 D. 137.

Our remarks will be much abbreviated in consequence of what has been already stated with regard to adjudication in implement.

ADJUDICATION
SUBSTITUTED
FOR APPRISING,
1672, c. 19.

Adjudication was substituted by 1672, cap. 19, for the ancient apprising by messengers. This Statute empowered the Lords of Session to adjudge the debtor's estate in land, or other rights formerly appraisable, to his creditors in two forms:—

(1.) By *special* adjudication, so called because by it there was to be adjudged only such part of the debtor's estate as should be worth the principal and interest of the debt, with a fifth part more in respect of the creditor being forced to take land in place of his money, besides the composition to the superior for the adjudger's entry, and the expense of his infestment. Lands thus specially adjudged might be redeemed by the debtor within five years from the date of the decree.

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SPECIAL ADJUDICATION.

(2.) By *general* adjudication. If the debtor did not produce a sufficient right to the lands, and deliver the same, or transumps, to the creditor, or if he did not renounce the possession and ratify the decree, so that the creditor might have a clear right and quiet possession, then the creditor might adjudge the whole estate of the debtor, in the same way as he might have appraised the same under the Statute 1661. This is the general adjudication, and the conclusion in it does not include the additional fifth part, but only the principal sum with interest, and penalty, if any is stipulated, and the composition to the superior, and expenses of infestment. Interest upon the composition and expenses of infestment may also be adjudged for.

GENERAL ADJUDICATION.

A. S., 26th
Feb. 1684.

The general adjudication, while thus introduced only as an alternative of special adjudication, has in practice proved the only available form of the diligence, although both conclusions were, in compliance with the Statute, necessarily retained until the Lands Transference Act declared it no longer necessary to libel or conclude for special adjudication, which is thus practically abolished. The same Statute has abolished the bill which formerly preceded the summons of adjudication.

10 & 11 Vict.
c. 48, § 18.

The form of the summons will be found in the Juridical Styles. It is founded on a narrative of the ground of debt; and the conclusions are:—

FORM OF SUM-
MONS.

- (1.) For special adjudication, and production of titles.
- (2.) For general adjudication.
- (3.) For warrant of infestment and horning against superiors.

The first conclusion is now unnecessary, and by the Lands Transference Act, § 19, the decree may contain warrant to a notary public to give infestment to the adjudger and his heirs and successors, whereby he may immediately hold base of the debtor, to the effect, and under the liabilities to the superior, already explained.

DECREE MAY
NOW CONTAIN
WARRANT TO
INFEST.

The adjudication is completed by recording an abbreviate within sixty days of the judgment, which, however, is not indispensable, as we have already seen, for the security of an adjudger who is immediately infest. It is the infestment which determines the preference, as it completes the real right; and that right prevails against personal rights granted by the debtor for onerous causes, not completed by infestment; *Mitchell v. Ferguson*, 13th February 1781—a preference expressly secured by 1661, cap. 62. The preference here extends

REGISTRATION
OF ABBREVIATE
OF ADJUDICA-
TION.CRITERION OF
PREFERENCE.

M. 10,296.

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to the principal sum and whole bygone interest; and, when it is desired that interest should run upon so much of the sum in the adjudication as consists of interest, that may be effected by pointing the ground, which is diligence executed, and makes the claim of interest real.

Pari passu
PREFERENCE OF
ADJUDICATIONS.

A *pari passu* preference of adjudications was introduced by 1661, cap. 62, which gives an equal ranking to all adjudications led before that first made effectual, and to those led within year and day after it. We have already referred to the Act, 54 Geo. III. cap. 137, which declared in § 11, that passing a signature in Exchequer for a Crown holding, and a charge of horning for lands held of subjects, and recording an abstract of the signature or charge in the register of abbreviates of adjudications, should be the proper diligence for rendering an adjudication effectual. The equivalent in Crown holdings is now the registration of an abstract of the draft Crown charter and a copy of the relative note.

10 & 11 Vict.
c. 51, § 23.

When the process of adjudication is directed not against the debtor himself, but against his heir, or when an heir unentered is himself the debtor, the procedure is in exact accordance with the steps which we have described as requisite in the action of adjudication in implement in the same circumstances.

ADJUDGER'S
RIGHT REDEEM-
ABLE.

The right acquired by the adjudger is a redeemable right only, the debtor having it in his power to redeem the lands at any time within the legal reversion, which in special adjudications is five years—in general adjudications, ten. During the legal, accordingly, the right is not a judicial sale under reversion, but merely a *pignus prætorium*, or security for the debt judicially conferred; *Cochrane v. Bogle*, 2d March 1849. Nor does the right of the adjudger become absolute even after the legal period of reversion has elapsed. In order to convert it into an irredeemable right there is required either (1.) a decree declaring the legal expired, which is the proper way to extinguish the privilege of reversion; *Campbell v. Scotland*, 7th March 1794; or (2.) possession upon charter and sasine during forty years from the date of expiry creates an irredeemable right; *Ormiston v. Hill*, 7th February 1809. But, even although charter and sasine be obtained, if no possession ensue, the adjudication is extinguished by the negative prescription; *Anderson v. Nasmyth*, 3d March 1758; and in *Home v. Creditors of Eyemouth*, 29th January 1740, the superiority of lands having been adjudged, and the adjudger infest, but not in possession, the vassals were held entitled, even after expiry of the legal, to take their entries from the former superior.

M. 321; 1 Ross,
L. C. 155, 173.

F. C.; 1 Ross,
L. C. 172.

M. 10,676;
1 Ross, L. C.
152.

Elchies, voce
"Adjudica-
tion," No. 23.

It is to be observed generally, that adjudication being of the nature of diligence, the whole procedure must be rigidly accurate. In *Barclay v. Alexander*, 25th February 1846, decrees of constitution and adjudication were reduced in consequence of mis-recital, 9th for 19th, in the date of the bill upon which they proceeded.

8 D. 549.

It is to be observed also, that, in order to be effectual, this diligence must be followed out without undue delay. Neglect for four years, and for three years, to obtain infestment have been held such *mora*, as to give effect to infestments granted by the debtor posterior to the adjudication.

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CHAPTER V.

See Ersk. Inst. ii. 12, 27.

Here we have to repeat the remark already made more than once, that in this transmission, no less than in that which is voluntary, we must have a regard to the condition of the title of the party adjudged from; and the adjudication and title expedite upon it must be directed to produce precisely the same effects as would be aimed at in a title obtained voluntarily. An instance of loss from want of attention to this appears in *Mackenzie v. Ross and Ogilvie*, 1st June 1791. A Crown vassal died having previously executed a disposition with procuratory *a me vel de me* in favour of his son, who was infest, but not entered with the Crown. One creditor endeavoured to attach the property by adjudication and charter from the Crown, upon which she granted infestment (in what manner the report does not explain) in favour of herself in the property. This was clearly inept, there being no procedure to attach the base fee in the son. Another creditor obtained a charter of adjudication with confirmation of the base right, and this was held to be the first effectual adjudication of the property. The case of *Marshall and Ruthven v. Wight*, 1st March 1782, is another instructive decision in the same view. A creditor here adjudged a subject to which his debtor had right by an unexecuted procuratory, and upon the decree of adjudication obtained infestment. The debtor's heir afterwards obtained infestment in her own favour upon resignation by virtue of the unexecuted procuratory. The infestment upon the adjudication was held to give no title.

ADJUDGER
MUST HAVE RE-
GARD TO STATE
OF TITLE.M. 275; 1 Ross,
L. C. 183.

M. 6927.

An adjudger for debt is not bound to produce his debtor's titles to the superior.

Stair, iii. 2, 26.
Ersk. ii. 12, 24.

Adjudication may be led not in satisfaction, but for security, which is allowed where the creditor is in danger of losing his recourse—as, for instance, when the debtor is *vergens ad inopiam*, or exclusion apprehended from adjudication year and day before. This can never be more than a security. It has no legal, and may be redeemed at any time.

ADJUDICATION
IN SECURITY.

There was a distinction formerly between the grounds and warrants of adjudication. The warrants were the general and special charges or other steps of procedure, and the adjudger was not bound to produce these after twenty years. The grounds are the decree of constitution, or bond, or bill, upon which the diligence is founded, and these must be produced, if called for within forty years; *Earl of Aberdeen v. Irvine*, 24th January 1771.

GROUNDS AND
WARRANTS OF
ADJUDICATION.

5 Br. Snpp. 465.

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CHAPTER V.

III. POINDING THE GROUND.

COMPETENT TO
CREDITOR WITH
REAL RIGHT.

This is a diligence of real execution competent to any creditor whose right is real, *e. g.*, to a superior for his feu-duties—to one infeft in an annual-rent right for the annual-rent due—and, generally, to all creditors, whose debts form a real burden upon the grounds. But it is not competent to proprietors, or to heritable creditors in possession.

ATTACHES
MOVEABLES ON
THE GROUND.

It attaches all moveables found upon the ground affected by the real right, excepting those which belong to strangers; and the tenant's moveables also are excepted, in so far as they exceed the current term's rent.

1469, c. 27.

FORM OF SUM-
MONS.

The diligence begins with a summons founded upon the ground of debt, which is narrated, along with the description of the lands, and the sasine of the creditor. The defenders are the proprietor and tenants. The apparent heir of the proprietor may be a defender without charging him to enter, the conclusions being against the moveables, and not against the defender personally.

CONCLUSION OF
SUMMONS.

The conclusion is, that letters should be directed to messengers-at-arms, charging them to search for, arrest, poind, and distrain, the defender's moveable goods, but, as against the tenants, to the extent only of the rents due.

LETTERS OF
POINDING THE
GROUND.

14 D. 513.

Upon the decree letters of poinding may be obtained. But execution has been decided to be competent upon a decree of the Sheriff without either signet letters or Sheriff's precept; *Kennedy v. Buik, &c. (Ramsay's Trustees)*, 17th February 1852.

EFFECT OF DI-
LIGENCE LIMIT-
ED BY BANK-
RUPT ACT.

18 S. 237.

This diligence was sometimes a formidable engine in the hands of creditors in bonds and dispositions in security, enabling them upon the sequestration of their debtor to appropriate any stock or other moveable property belonging to him, the summons being competent after sequestration, if instituted before confirmation of the trustee; *Campbell's Trustees v. Paul*, 13th January 1835. But, by 2 & 3 Vict. cap. 41, § 95, the effect of poinding the ground after the sequestration is limited to the interest of the current term, and the interest in arrear for the year immediately preceding.

2 Wil. & Sh.
App. 71.

It is only by attachment under this or other diligence that real creditors can obtain a preference to moveables on the ground; *Hay v. Marshall*, 22d March 1826; and we have already noticed, that poinding the ground is the proper expedient to make interest real, so that adjudication deduced may include interest upon the interest.

CHAPTER VI.

ACCESSORY WRITS EMPLOYED IN THE SALE AND PURCHASE OF
HERITABLE PROPERTY.

WE have now arrived at the concluding branch of our inquiries, which is to consist of a brief examination of the writings employed in the sale and purchase of heritable property. It is a first principle, that the transmission of lands, or an obligation to transmit, can be effectually made in writing only. A verbal agreement to sell lands is not binding, even although it be admitted, unless there have been *rei interventus*, as by payment of the price or a part of it. But the instances of this are necessarily so rare as to leave the general rule which requires writing almost without exception in practice.

TRANSMISSION
OR OBLIGATION
TO TRANSMIT
CAN ONLY BE IN
WRITING.

The writing by which heritage is transferred, or agreed to be sold, must be probative ; and it must be binding upon both parties. An offer without an acceptance will not do. Both parties must be bound, or neither is so ; *Fulton v. Johnston*, 26th February 1761. There is required, therefore, a holograph or tested agreement by offer and acceptance, or by mutual contract, or minute obligatory upon both parties ; *Barron v. Rose*, 23d January 1794. Here a sale was held not to be complete, because, although the offer was probative, the acceptance was not so.

WRITING MUST
BE PROBATIVE,
AND BINDING ON
BOTH PARTIES.
M. 8446.

The writing must import a clear and finished obligation upon both sides without any reservation or condition not assented to by either party.* If there is any stipulation not agreed to, and not withdrawn,

* In *Thomson v. James*, 13th November 1855, a land estate having been advertised for sale, a party made an offer by letter for the purchase of it, but he did not specify any time during which his offer should be binding. In the course of a few days the seller posted an acceptance of the offer, while, on the same day, the offerer posted a retraction, and the letters both of acceptance and retraction were delivered upon the following day. In an action of implement of the sale at the instance of the seller, it was held, that a valid contract of sale had been entered into, and that the offerer was, consequently, bound to implement it. The question here at issue between the parties was, whether the offer was recalled before it was accepted. The Court were of opinion, that, while a simple unconditional offer may be recalled at any time before acceptance, and may be so recalled by a letter sent by post, still that *the mere posting of a letter of recall* does not make that letter effectual as a recall, so as, from the moment of posting, to prevent the completion of the contract by acceptance ; and that, as an offer is nothing till communicated to the party to whom it is

18 D. 1.

M. 8463.

- PART III. there is *locus pœnitentiæ*, and the bargain may be resiled from. This holds, however far the negotiation may have proceeded, if it has not arrived at the point of a finished sale; *Milne v. Anderson*, 19th February 1836, affirmed 16th March 1837; and, even although the disposition be granted, and the purchaser infest, the price not having been fixed or paid, and the parties unable to agree, the disponent will be ordained to reconvey; *Stirling v. Honyman*, 2d March 1824. The parties may be bound, however, although the terms of the sale be not specifically fixed in the contract, provided it contain a means of ascertaining the terms, assented to by both parties; and so, in *Earl of Aberdeen v. Laird*, 26th November 1823, a bargain imperfect in itself was held to be completed by an agreement that the point unsettled should be regulated by a judgment of Court. We shall presently see, also, that the price may be matter of reference.
- CHAPTER VI.
14 S. 533.
2 Sh. & M'L.
App. 494.
- 2 S. 765.
- 2 S. 527.

I. MISSIVES OF SALE AND PURCHASE.

MISSIVE LETTERS.

Heritable property is for the most part sold by missive letters, the offer containing the price and term of payment, the term of entry, an obligation on the seller to deliver a valid disposition and progress of titles, (which obligation is implied, though not expressed.) Delivery of a search of incumbrances should also be required; and missives generally settle how the expenses of the disposition are to be paid, the ordinary rule in the absence of any stipulation imposing these expenses upon the seller. From the risk of error, and the professional knowledge requisite to act correctly in so important a matter, it is evidently very unadvisable that missives of sale should be written by any but legal practitioners, or under their immediate direction.

Let us look at the obligations upon the respective parties, beginning with the seller.

1. OBLIGATION OF SELLER TO GIVE VALID TITLE.

2 Wil. & Sh.
App. 522.

2 D. 1494.

1. *Obligations of the seller.*—The seller is bound to give a valid title, and this the purchaser may insist upon, if he have not expressly waived the right; *Dick v. Donald & Cuthbertson*, 12th December 1826. If he cannot produce an unobjectionable title, that circumstance alone disqualifies him from insisting on the sale; *Robertson v. Rutherford*, 18th July 1840. If the sale has been completed the seller must repeat the price of any part of it evicted, and this holds, even

made, so the recall of an offer can have no effect till it has been communicated, or may be assumed to have been communicated, to the party holding the offer without as yet having accepted, the purpose of the recall being to prevent such acceptance. Such purpose fails, if the acceptance has gone forth; and it is sufficient if the letter of acceptance have been put into the post-office, it not being necessary to a completed acceptance that the letter reach its destination.

although he be bound in personal warrandice only, if he was expressly obliged to exhibit a valid title ; *Bald v. Scott, and Globe Insurance Co.*, 17th December 1846. The agent is liable in reparation for failure to get a good title ; *Brown v. Cheyne & M'Kean*, 10th March 1831.

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CHAPTER VI.
10 D. 289.
9 S. 573.

What constitutes a good title, or, as it is called, a valid progress ? This question is answered by the Act 1617, cap. 12, which enacts, that the enjoyment of lands by virtue of heritable infeftments for forty years ensuing the date of infeftment, without lawful interruption, shall exempt the proprietor from being troubled or pursued by the Crown, or subject superior, or any other person pretending right in virtue of prior infeftment, or on any other ground except falsehood, provided the possessor can shew a charter to himself or his predecessors with sasine preceding the forty years ; or, where there is no charter, that he shew instruments of sasine, one or more, standing together for forty years, and proceeding either upon retours, or upon precepts of *clare constat*. This is what Mr. Burke calls the solid rock of prescription—the soundest, the most general, and the most recognised title between man and man, that is known in municipal or in public jurisprudence—a title in which not arbitrary institutions but the eternal order of things gives judgment—a title which is not the creature, but the master of positive law—a title which, though not fixed in its term, is rooted in its principle in the law of nature itself, and is, indeed, the original ground of all known property.

WHAT CONSTITUTES A VALID PROGRESS.
PROVISIONS OF 1617, c. 12.

The seller must, therefore, connect himself by a continuous series of titles with a charter, (which in the sense of this Act includes a disposition,) and infeftment thereon, followed by forty years' possession in virtue of the charter and infeftment or of sasines flowing from the grantee ; or, secondly, there must be sasines standing together for forty years, the earliest proceeding upon the retour or precept in favour of an heir. If the charter be lost, there cannot thus be a sufficient title, unless it have been followed by retour or precept, and sasine previous to the forty years. The sasine must be connected with the charter, and, if it be not in favour of the grantee, but of his assignee, whose mid-couple is lost, that is a defect, there being no evidence that the party infeft had right to the warrant ; *Maconochie v. Trinity Hospital*, *supra*, p. 773. already cited.

We have already had occasion to refer to the case of *Orniston*, as *supra*, p. 824. establishing that decree of adjudication followed by charter and sasine, and forty years' possession after expiry of the legal, is a good title. The case of *Robertson v. Duke of Athole*, 10th May 1815, is to the same effect. It is irrelevant to allege insufficiency of the dis-poner's title, when it has been fortified by prescription ; *Duke of Buccleuch v. Cunynghame*, 30th November 1826.

3 Dow's App.
108 ; 1 Ross,
L. C. 208.

5 S. 57.

It is important to observe what amounts to sufficient possession. Singular successors must abate the time during which they possessed

WHAT SUFFICIENT POSSESSION UNDER 1617, c. 12.

- PART III.
CHAPTER VI.
M. 10,810.
YEARS OF
MINORITY DE-
DUCTED.
M. 11,156.
- on a personal title ; but an apparent heir's possession is counted, although he be not infest, it being reckoned a continuance in his person of the possession of his ancestor ; *Caitcheon v. Ramsay*, 22d June 1791.
- The Act is interpreted as saving the rights of minors, and the years of the minority of those against whom prescription runs are, therefore, to be deducted ; *Blair v. Shedden*, 6th December 1754. In an entail with a long series of heirs, upon a challenge by an heir substitute, it is competent to deduct only the minority of that heir to whom the succession is open ; *Macdougall v. Macdougall*, 12th July 1740 ; *Mackay v. Dalrymple*, 23d November 1798.
- A single act of patronage does not constitute sufficient possession of that species of property, although the presentee live more than forty years, because that is not continued possession ; *Macdonell v. Duke of Gordon*, 26th February 1828.
- DUTY OF PRACTITIONER IN EXAMINING PROGRESS OF TITLES.
- The practitioner, therefore, must examine every writ, and ascertain not only that it is probative, and without defect or vitiation, but also that it is sufficient for its purpose, and accurately connected with the links of the progress which precede and follow it ; and that the whole taken together form an unbroken chain, commencing with a charter and infestment, or with the sasine of an heir more than forty years back, and ending with a right validly transmitted into the seller's person. Preparatorily to this examination, there must be an
- INVENTORY OF TITLES.
- Inventory of titles* framed with great care, in order to shew the succession and feudal connexion of the different writs composing the progress. If the lands consist of different parcels, the titles of each parcel must be classified under a separate head with proper references, and such an arrangement as to shew what titles, if any, embrace the whole lands. The agent must ascertain here, that there is a complete progress for each parcel, and that each writ in the progress is valid, and aptly framed, so as to transmit the property according to correct feudal principles.
- PURCHASER NOT BOUND TO ACCEPT DOUBTFUL TITLE, UNLESS SPECIAL STIPULATION.
- If it shall appear that the validity of the title is doubtful, the purchaser cannot be forced to accept it, for no one is obliged to purchase upon a title subject to rational doubt ; *Brown v. Cheyne & M'Kean*, 6th December 1833. In *Dunlop v. Crawford*, 26th May 1850, although there was no reasonable doubt of the sufficiency of the title, the seller was required to take steps in order to obviate the probability of the purchaser being exposed to trouble and expense in discussing questions apparently set at rest by the long prescription. The removal of a doubt or of an admitted defect must be made entirely at the seller's expense, and the buyer is liable for no part of it, unless expressly bound to that effect. This was held, where the seller was bound to give a disposition conveying the right standing in his own person to the purchaser ; *Smith v. Aitken*, 13th February 1827 ; and,
- 6 S. 600.
- 12 S. 176.
11 D. 1062.
- 5 S. 340.

in *Kerr v. Marquis of Ailsa*, 12th June 1852, the purchaser was held entitled to the expense of removing reasonable doubts, although his objections were repelled. But, if there be a stipulation that the purchaser shall take the title as it stands, the Court will give effect to that agreement; *Anderson v. Matheson*, 4th December 1818. A condition obliging the purchaser to be satisfied with the title as it stands is always inserted in articles of roup, making it incumbent for the purchaser to satisfy himself of the sufficiency of the title before the sale, and debarring him from objecting to it. But, while the condition generally receives effect, it is subject to the qualification already referred to, that the mere exposure or offer of a property for sale implies a guarantee that the offerer has a right, although the titles may be feudally defective. Such stipulations, therefore, do not protect a title radically bad. Accordingly, in *Carruthers v. Stott*, 26th May 1825, although the title was inept, the purchaser was held bound, because the substantial right of property truly belonged to the party whose interest had been judicially exposed and purchased. The same principle determined the decision in *Sorley's Trustees v. Grahame*, 14th February 1832, where the purchaser was not allowed to withhold the price on the ground of a defective title, because the seller had a right capable of being made effectual by adjudication in implement.

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CHAPTER VI.
14 D. 864.

A F. C.

EXPOSURE FOR
SALE IMPLIES
WARRANTICE
THAT SELLER
HAS A RIGHT.

4 S. 34.

10 S. 319.

A complete title implies that the disponent shall himself hold of the superior; and, if the lands are in non-entry, the seller is bound to enter, if required, before the transfer is completed, unless there be an agreement to the contrary; *Gardiner v. Anderson*, 7th March 1799. Here it was observed on the Bench:—"Wherever the seller can complete a real right, he is bound to do so at his own expense, unless there be an express stipulation to the contrary. The purchaser is not obliged to accept of a title which would force him immediately to enter as a singular successor."

DISPONENT MUST
HOLD OF SUPERIOR.
M. 15,037.

The leases of the property purchased ought to be examined, as they may contain conditions materially affecting the rental and value—as, for instance, when the tenants are entitled to reimburse themselves of outlays from the future rents, or when they have claims for ameliorations. Thus, where buildings had been erected by a tenant, and the landlord was bound to pay for them at the end of the lease, that obligation was held good against a purchaser; *Fraser*, 9th March 1824. And, in *Bell v. Lamont*, 14th June 1814, the right of tenants to remove doors and windows, and to receive from the landlord full value for the shells of the houses, was held effectual against a purchaser. Where the purchaser is bound to implement undertakings to tenants, in so far as not already implemented, he must satisfy himself how far they have been implemented, and is not entitled to rely on the statement of an agent or trustee giving the best information he

LEASES, &c.
SHOULD BE
EXAMINED BY
INTENDING
PURCHASER.

2 Sh. App. 37.
F. C.

PART III. possesses, but without any guarantee; *Murray v. Selkraig*, 26th
CHAPTER VI. January 1815.
F. C.

M. 15,874.

We have already had occasion to notice the claim of terce as effectual against a singular successor acquiring from the heir, and to refer to the case of *Boyd v. Hamilton*, 7th March 1805, where it was decided that the purchaser may retain part of the price until the terce is satisfied.

The state of the teinds ought to be looked into, in order to ascertain—(1.) whether there is a right to them, because heritors who have no right to their teinds are first localled on for augmentations; and (2.) whether the teinds have been valued, and how far they have been appropriated for stipend, in order to determine the probability and extent of a future increase of burdens under this head.

2. OBLIGATION
OF SELLER TO
DELIVER VALID
DISPOSITION.

2. The second great obligation upon the seller is to execute and deliver a valid disposition of the subjects. It must convey the subject purchased, and the purchaser is not bound to accept an equivalent, but is entitled to resile when the seller is unable to dispoise the identical

4 D. 1411.

WHERE SUB-
JECT LIABLE TO
EXCEPTION OR
RESERVATION
UNKNOWN TO
PURCHASER.

ground which he bargained for; *Earl of Moray v. Pearson*, 11th June 1842; and the condition of the subject disposed must be not less advantageous than the purchaser was entitled to expect from the terms of the bargain. If it shall turn out, that it is held under any exception or reservation materially affecting the property, he is entitled to resile, if not apprised of this at the time of the purchase;

4 D. 121.

Robertson v. Rutherford, 27th November 1841. Here the purchaser was freed, because not informed that the minerals were reserved to the superior with right to make roads and sink pits, and that the lands were subject to a restriction against building. So also, in *Patton v. Smart*, 11th March 1825, lands having been sold for a price, to be holden blench of the seller for a penny Scots, it turned out that the property was burdened with a feu-duty of £340 to the seller's superior. The seller was held bound to disencumber it of that burden. A mere error in the description of the extent, however, is held to be demonstrative and not taxative upon the principle formerly explained;

3 S. 653.

M. vocs "Sale,"
App^s. No. 2.

Gray v. Hamilton, 23d January 1801; and a singular successor is not bound by servitudes and restrictions as to the height and form of buildings, &c., which were not inserted as conditions in the grant, but have merely been exhibited in a plan shewn when the contract was entered into; *Gordon v. Marjoribanks*, 16th February 1818.

6 Dow's App.
87.

DISPOSITION
MUST BE IN
FAVOUR OF
PARTY NAMED
IN CONTRACT;
2 Wil. & Sh.
App. 332.
AND IN VALID
FORM.

The disposition must be in favour of the party named in the contract. The superior is not bound to grant a charter to a party not named in the missive, or upon terms not stipulated, e.g., to a wife in liferent, and children in fee; *Campbell v. Steele & Lang*, 23d May 1826. The conveyance must be in valid form. A law-agent, by undertaking to prepare and complete the title of a purchaser, comes under an implied obligation to see that the disposition and infeftment shall constitute a valid and sufficient feudal title. In *Donald's Trustees v.*

4 D. 1249.

Yeats, 11th July 1839, we have an instance of an agent held bound to rectify an error arising from his failure in duty in this respect.

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A seller is not bound, without express stipulation, to give a disposition with double manner of holding, but only such a conveyance as will by a valid title enable the purchaser to take his place; *Millar v. 6 D. 149. Young*, 1st December 1843.

The title must be furnished *tempestive*, and even although the price has been paid, the purchaser will not continue bound if a title be not furnished within a reasonable time. In *Fleming v. Harley's Trustees*, 2 S. 373. 6th June 1823, the seller, having failed to produce a title for three years, was ordained to repay the price; and, in *Little's Trustees v. 8 S. 418. Spankie*, 29th January 1830, the purchaser having been unable to implement a re-sale of the property from delay in delivering a title to himself, the seller was found liable in damages; and, in *Hutchinson & Son v. Scott*, 22d January 1830, avoidance of the bargain having been stipulated, unless a title were delivered before a fixed date, a delay of fourteen months after that date was held to free the purchaser. But, if the purchaser shall acquiesce, or not object in due time to a proposal to cancel the bargain, the seller may thus be freed; so, where the seller wrote, "If you are not satisfied with the "title, the bargain may be considered at an end," to which no answer was made, and the seller wrote again, "I hold the bargain at an end," and received to that no answer, the purchaser was found not entitled to insist for implement three years afterwards; *M'Neill v. Cameron*, 21st 8 S. 362. January 1830. On the other hand, where the purchaser, after successfully objecting to the validity of a title, does not abandon the purchase, but requires fulfilment, he is bound to implement his part, and this was enforced upon a valid title being offered, at a distance of eleven years; 5 Wil. & Sh. *Dick v. Cuthbertson*, 1st October 1831. In order to entitle a party to be free within a limited time, the stipulation to that effect must be very express. The propriety of this rule is shewn by the observation, made in *Raeburn v. Baird*, 5th July 1832, that, as upon the purchase of heritage, a progress must be produced and examined, the discussion of the objections and production of searches may require some time. This is in view of all the parties. If, therefore, the purchaser requires it to be an essential condition of the bargain, that he shall have a perfect title by a certain day, he must expressly stipulate for that, and on failure declare his bargain at an end. There being no such stringent condition in this case, a delay of six months after the sale was held not to entitle the purchaser to resale.

The third great obligation upon the seller is to disencumber the subjects. But how is the extent of his obligation in this respect to be ascertained? Exhibition of a search of encumbrances is usually stipulated for, and, if it be not, there is a general professional understanding, that the seller is bound to produce a search, unless he stipulates for exemption. What registers must the search embrace?

3. OBLIGATION
OF SELLER TO
DISENCUMBER
LANDS.

PART III.

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SEARCH OF
ENCUMBRANCES.

(1.) In order to test the accuracy of the radical title according to the writs produced, there must be a search of the registers of sasines, general and particular. If there have been any other titles expedited than those produced, the search will disclose them, and indicate the register where their tenor may be ascertained. In purchases of burghage subjects the search will be of the burgh register.

(2.) The search of the same registers will shew, what burdens have been charged by infeftment or bond and disposition in security upon the property, and whether any of these have been wiped off by renunciations or discharges. The search, however, cannot be trusted to, as exhibiting all the burdens. Real burdens may be constituted by the titles of the property without being noticed in the search of encumbrances, and this shews the importance of a very exact examination of the titles.

Searches are generally for a period of forty years antecedent to the purchase, and this may fail in exhibiting all the burdens, as there may be encumbrances upon record of an older date, not renewed by precept of *clare constat* or otherwise, and not transmitted so as to reappear in the register, but still kept alive privately by the payment of interest. This is a risk, which cannot be altogether avoided. The protection is the rarity of such an occurrence; and the practitioner must have an eye to the trustworthiness of the parties and agents transacted with.

(3.) In order to ascertain that the disponent has not been prohibited from alienating, there must be a search of the general register of inhibitions, and of the particular registers for the county in which the seller resides and the property lies. These will also shew, whether the seller is under interdiction. If there are any inhibitions undischarged, discharges must be insisted for, unless the party inhibited has been afterwards sequestrated; the sequestration terminating the effect of inhibition in relation to third parties, for it is under it that inhibitions must be made effectual.

(4.) A search of the register of adjudications will shew, whether the lands have been adjudged, or embraced in a mercantile sequestration.

(5.) A search of the register of entails may be made, where there is any reason to suppose a necessity for inquiry on this head, although the prohibitions and other clauses must, in order to be effectual, appear in the register of sasines by an insertion, or by reference in terms of the recent Statute.

(6.) When the agent is not able from any circumstance to act with perfect confidence, and sees cause for inquiry more than ordinarily minute, a search of the register of interruptions of prescription will shew, whether there are any objections to the title founded upon remote questions, prevented from becoming sopite by judicial inter-

ruption, which is effected by raising a summons of interruption of prescription, and recording the summons and execution in terms of 1696, cap. 19. PART III.
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Whatever encumbrances are disclosed by the search, the seller must disburden the subjects of them by procuring and recording proper discharges. Where the seller has bound himself to purge the record, he is bound to get it cleared of an adjudication recorded more than forty years back, and the debt in which is paid; *Mitchell v. Thomson's Trustees*, 27th November 1827. But this rule does not extend to such apparent rights in other parties, as do not in reality imply any real encumbrance, or ground of apprehension. So, where the lands purchased were liable in real warrandice of other lands, but of which the title was amply secured by prescription, that was held not to be such a real burden as the purchaser could require to be discharged; *Durham's Trustees v. Graham*, 9th July 1800. If the estate be burdened with a liferent, the concurrence of the liferenter must be procured, otherwise the purchaser will be entitled to retain a portion of the price equivalent to the value of the burden, until a discharge is produced. The purchaser may be authorized to discharge heritable debts out of the price, and he has an indefinite power of retention, until encumbrances are purged, as long as the seller remains creditor for the price. But, if the purchaser shall deal with a third party about the price, he must expressly reserve his right of retention until purgation, otherwise that right ceases. So, in *Smith v. Sommervell*, 2d July 1706, the purchaser gave bond for part of the price to a third party, reserving power to retain the amount for five years, in order that an inhibition might be purged in the meantime. The right of retention was held to have ceased at the end of five years, although the inhibition had not then been purged. On the other hand, although it may have been agreed that a security upon lands sold shall continue to affect them, the creditor will have no personal claim against the purchaser, unless he obtains an obligation from him. So, in *Kippen v. Stewart*, 24th February 1852, although the purchaser was taken bound to relieve the seller of the sum in the security, it was found, that the purchaser was not thereby made the debtor of the party secured, and, therefore, the purchaser being sequestrated, the creditor could not rank on his estate. SELLER MUST
PURGE RECORD.

PURCHASER'S
RIGHT OF RE-
TENTION OF
PRICE.

The seller's obligation to disencumber is not limited to the burdens appearing on the record. If the purchaser have private knowledge of other burdens, he is not bound to pay the price until they are discharged; *Ralston v. Farquharson*, 17th June 1830; and, in *Urquhart v. Halden*, 2d June 1835, the seller was held bound to free the subject of a servitude against the erection of breweries, foundries, &c., not appearing on the record, but standing upon a contract by the seller which had not been revealed to the purchaser at the sale. OBLIGATION TO
DISBURDEN NOT
LIMITED TO BUR-
DENS ON RE-
CORD.
8 S. 927.
13 S. 844.

- PART III.** The purchaser is responsible for his private knowledge, as well as
CHAPTER VI. the seller, and, if he accept of a title, when cognisant of a prior right
 to a third party which does not appear upon the records, he cannot
 claim a preference; *Lang v. Dixon*, 29th June 1813; *Magistrates of*
F. C. *Airdrie v. Smith*, 12th July 1850—a case which shews, that, if the dis-
 12 D. 1222. ponee knows that the right of the disponent is truly a trust inconsistent
 with the granting of the conveyance, then the disponent is liable to
 the exception.
- PURCHASER** 2. *Obligations of the purchaser.*—The obligation on the purchaser
MUST PAY PRICE is to pay the price, when the disposition is delivered. The convey-
ON DELIVERY. ance is not effectual to the disponent, until delivered. Consequently,
Ersk. Inst. iii. when the disposition is retained until the price is paid, the disponent
 5, 3. is preferable upon the price; *Baird v. Jap*, August 1758; and, when
M. 14, 156. it is a condition, that the bargain shall be void, if the price be not
 paid, or caution found, within a specified time, that condition may be
 made effectual to annul the bargain; *Young v. Dunn*, 9th March
M. 14, 191. 1785; and again, in *Menzies v. Barstow*, 4th July 1840, it was found,
 2 D. 1317. that, if the purchaser failed to find caution as stipulated, he is not
 entitled to implement. The cautioner whom he does produce must
 be subject to the jurisdiction of this country; *Davidson v. Kerr*, 19th
F. C. January 1815.
- PRICE MAY BE** The price is either named in the contract, or it may be agreed, that
FIXED ON A RE- the amount shall be fixed by referees. The nomination of referees
REFERENCE. completes the bargain, and such a reference does not fall by the death
 of a party; *Earl of Selkirk v. Nasmyth*, 17th January 1778.
M. 627.
- TERM OF PAY-** When the price is payable at a term, it is due on the 15th May or
MENT OF PRICE. 11th November, even where, by the custom of the country, tenants
F. C. are not bound to remove until a later day; *Stewart v. Earl of Cassilis*,
 21st December 1811. The offer of a price implies the offer of interest
 upon that price from the date of possession; *Speirs v. Ardrossan*
5 S. 764. *Canal Company*, 5th June 1827. When by the terms of the contract
 the purchaser is debarred from retaining the price, or any part of it,
 for his own security, the seller must relieve him of damage arising
 from the premature payment; *Moir v. Paul*, 27th May 1830.
8 S. 823.
- ABATEMENT IN** Claims for abatement of the price depend upon error in *substan-*
PRICE, WHERE *tialibus*, as we found formerly in the case of *Hepburn*. The doctrine
ERROR IN SUB- is also illustrated by *Wilson v. Campbell's Creditors*, 14th November
STANTIALS. 1764, where, on the one hand, a depression in the value of the sub-
supra, p. 65. jects was held to form no ground for abatement; and, on the other
M. 13, 330. hand, teinds having been paid for, to which it was afterwards ascer-
 tained that the seller had no right, deduction was allowed on that
 head. And, in *Gordon v. Hughes*, 15th June 1815, the property
F. C. having been represented as affording a vote for a member of Parlia-
 ment, but which afterwards proved bad, abatement was allowed.

It may be agreed, that the price, or a part of it, shall remain a burden upon the property. In that case the purchaser grants his personal bond for the amount, which is also charged as a real burden upon the subjects in the disposition and infeftment, according to the rules which have already been explained. The price thus remains heritable property to the seller, a circumstance necessary to be kept in view with reference to his settlements. The price is heritable also, although the purchaser's title be not completed, if the missives contain a stipulation that it is to remain a real burden; *Mead v. Anderson*, 27th June 1828. In the case of *Spence v. Ross*, 17th November 1826, affirmed 25th March 1829, in a sale by a father the purchaser engaged by missive to grant bond for the price to the father himself in liferent allenary, and to his sons *nominatim* in fee. At the father's request the sons subscribed a postscript, leaving the money in the purchaser's hands for eight years certain. Although no bond or disposition followed, the fee was held to be vested in the sons beyond the father's power of revocation.

PART III.
CHAPTER VI.
HOW PRICE
MADE A BUR-
DEN ON THE
LANDS.
6 S. 1034.
5 S. 17.
3 Wil. & Sh.
App. 380.

II. MINUTE OF SALE.

In transactions of great importance it is customary, in place of missive letters, to embody the contract of sale in a formal minute, which, though more expensive than missives, is more satisfactory in carefully defining the terms of the bargain. It is to be kept in view also, that missives must be stamped, before they can be used in evidence.

The minute of sale is a bilateral contract, containing on the one hand the obligations of the seller:—(1.) He is bound on payment of, or security for, the price to execute and deliver a valid disposition containing the usual and proper feudal clauses. Sometimes dispositive words are inserted in the minute, but it is more correctly confined to an obligation to dispoise. (2.) The seller is taken bound to deliver a sufficient progress of titles. But, unless the seller is confident of the sufficiency of the progress, he should not grant this obligation, which may enable the purchaser to retain possession without paying the price. When there is any deficiency or doubt in the title, the seller should avoid binding himself conclusively, unless the purchaser consent to take the title as it stands, or the parties are able to agree upon a remedy. A referee may be named, in case the parties shall differ with regard to the title. (3.) The seller binds himself to disburden of debts and encumbrances, and to deliver a search instructing that this has been done. (4.) The term of entry is fixed, with an agreement that the buyer shall have right to the rents after it; and there are mutual obligations with regard to the prior and future public burdens. On the other hand, the purchaser becomes bound to pay the price upon delivery of the disposition, or to grant

CLAUSES OF
MINUTE OF
SALE.

PART III. bond for it with caution, or, if so agreed upon, that the price or part
CHAPTER VI. of it shall remain a burden upon the subjects. There is then a submission of all disputes to an arbiter named, a penalty upon failure in implement, and a consent to registration.

Heritable property is frequently disposed of by auction under

III. ARTICLES OF ROUP.

These form the seller's acceptance by anticipation of the effectual offer which shall afterwards be made in terms of the conditions.

CLAUSES OF
ARTICLES OF
ROUP.

The articles commence with a title containing a description of the subjects to be exposed, the name of the exposor, and the place, day, and hour of the sale.

(1.) The first article provides for the exposure at a certain upset price, during the running of a half-hour sand-glass, and that the highest offerer at the outrunning shall be preferred. If a competition shall arise when the outrunning of the sand is near, it is the duty of the Judge to lay the glass on its side, or, if a watch is used instead, to stop it, so as to prevent the indication of the time having elapsed, until the competition is over; *Burns*, 27th November 1827.

M. voce "Sale,"
App^r. 4.

(2.) The second article binds each offerer to subscribe his offer as binding upon him, and specifies the amount by which every successive offer shall exceed the preceding one.

(3.) The third article fixes the term of the purchaser's entry, and payment of the price.

(4.) The fourth binds the highest offerer within a specified number of days after the sale, to grant bond with a cautioner for the price.

F. C.

(5.) The fifth article imposes a penalty upon the highest offerer in the event of his failure to find security. This penalty is the *maximum* of damages claimable for non-implement of an offer made at a public sale; *Johnstone's Trustees v. Johnstone*, 19th January 1819. This article empowers the exposor, upon such failure, either to resume the property, or to re-expose it, or to hold the next preceding offerer bound, and require him to grant bond with caution for the price. The offerers are thus fettered for some time. The clause gives no power to the preceding offerer to insist on being preferred, if the highest shall inadvertently allow the time to elapse without finding caution; *Walker v. Gavin*, 10th February 1787. But intimation to the next highest offerer, upon failure of the first, gives the person so called upon a right to reciprocal performance, which cannot be excluded by any equitable consideration for the other; *Hannay v. Stothert, &c.*, 15th July 1788; and to entitle the exposor to hold the next offerer bound, the proceedings must have been fair; and, if the price was raised at the sale by a white-bonnet, i.e., a party making fictitious offers, the next offerer is free; *Anderson v. Stewart*, 16th December 1814.

M. 14,193.

M. 14,194.

F. C.

(6.) The sixth article binds the seller to purge encumbrances, and grant a valid disposition containing the proper feudal clauses. This obligation may be limited to encumbrances preceding a specified date. Effect was given to such a limitation in *Young v. Grierson*, 19th July 1849. PART III.
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(7.) The seventh article arranges relief from, and liability for, public burdens.

(8.) The eighth provides for the delivery of a progress of titles, and stipulates that the purchaser shall have satisfied himself of their sufficiency beforehand, and shall not afterwards object. The effect of this condition we have already considered.

(9.) There may then be a condition for the division of expenses. A Judge of the roup is appointed, with power to determine questions arising at the sale, adjourn the roup, and prefer the highest offerer. An arbiter is also appointed to decide disputes regarding the import of the articles of roup. In *Watt and Anderson v. Shaw, &c.*, 6th March 1849, the clause of arbitration was held to include a question touching the right of the exposor to sell. Then, there is a penalty for non-performance, and a consent to register not only the articles, but the minutes of roup, the decerniture of the Judge, and enactment binding the purchaser, as well as any decree-arbitral which shall ensue. 11 D. 1482.

It is unnecessary to describe the procedure at the sale. Forms of adjournment, and of minutes of sale containing offers, with decree of preference, and enactment rendered obligatory on the purchaser by the subscription of himself and of the Judge, will be found in the Juridical Styles.

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CONCLUSION.

CONCLUSION.

I HAVE only, in conclusion, to say a word of caution against its being considered that the study of these Lectures is to be regarded as the end or completion of the Conveyancer's preparatory training. It is only a portion of the subjects occupying our attention, that we have been able to trace with any degree of minuteness to their original sources; and any idea which can be conveyed in Lectures of the application of the rules of Conveyancing must fall short of the practical and available knowledge requisite to confer skill and confidence in business.

The student, therefore, who would turn the labours of a session to their best account, will regard himself rather as having been set upon the way, than as having accomplished the journey. If we remember the vicissitude of human affairs—their infinite variety—the multiplicity of their new and unexpected turns and combinations; and, if we glance at the business of our Courts, and survey the long and successive series of Law Reports, and reflect, how much of care and anxiety, and research and learning, are daily called for in the investigation of questions regarding matters the most familiar, in connection with Statutes or with inveterate rules of practice not before imagined to admit of difficulty or dubiety—these considerations cannot fail to satisfy, that he who enters upon the legal profession with the most profound and extensive attainments, and the highest degree of cultivation and skill, must still feel, (the best qualified, the most strongly,) that in occupying this field he must be content to continue a learner during the whole of his career, in whatever sphere that may place him.

It cannot be amiss, then, that I should earnestly seek to impress not only the desirableness and necessity, for professional eminence, of continued study, but the expediency also of embracing every opportunity of acquiring familiarity with the application of legal principles to the details of business. It is the proper combination of theoretical with practical knowledge, that imparts power, and insures success. The study of principle alone, detached from the realizing examples of those affairs to which it is to furnish the rule, is apt to

result in pure idealism, and to become too ethereal and evanescent for any practical purpose. And, on the other hand, a merely technical practice, content to follow to-day the forms which it learned yesterday, must inevitably lose sight of reason and principle, and degenerate into a habit of formality and iteration. Thus, the theoretical can give no aid in sublunary matters, of which it is ignorant; and the technical, being limited to the matters which its forms suit, is at fault, whenever a new combination arises. It is the union of the two that gives strength and effective use; and those law-studies will be the most successful in their result, which, on the one hand, while drinking deeply of legal doctrine, mingle with it a constant reference to the affairs which it is to regulate; while, on the other hand, they examine and master the most ordinary and familiar forms and clauses in the light of the doctrine which alone gives them life and meaning.

It is impossible to look around us without perceiving the increasing necessity for legal practitioners to rest their claims to confidence upon their own attainments and skill. The wide diffusion of education—its elevated standard, and enlightening and stimulating qualities—the extension of political rights and privileges—the social advancement inseparable from these changes—and the increase of mental exercise and observation, and consequently of mental power which accompanies them—these have produced a growth in the general intelligence of which all must be sensible; and it is quite obvious, that an urgent demand thus arises for accurate attainment on the part of the practitioner. He cannot now rely so much as formerly upon the benefit of the conventional trust reposed in him just on account of his professional *status*, and which was to a large extent irrespective of his intrinsic acquirements and qualities. The causes just referred to are training up in the middle and lower classes a large body of increasing intelligence. How many thousands around us present the traits which made CÆSAR apprehensive of CASSIUS :—

“ He reads much ;

“ He is a great observer, and he looks

“ Quite through the deeds of men.”

Although, therefore, the Pocket Lawyer may not be in universal use, men are coming now to understand more about everything that relates to their own concerns, and to be more capable of detecting not only negligence, but the other causes of miscarriage in the conduct of business.

There is thus the strongest plea of self-interest for laborious preparation; but it is urged also by higher motives. I do not refer to the desire of distinction, which, whether it be called fame or reputation, is still an infirmity in whatever mind may cherish it. The prosecution of study as a duty—the preference of what is laborious

PART III.

CONCLUSION.

Jeffrey's Life,
ii. 167, 168.

and rugged to what is easy and enticing—self-denial in the face of temptation to indulgence—these are all parts of the moral discipline, from which follow results the most precious in the character and conduct. Listen to Lord JEFFREY:—"Those who have never been accustomed to submit to privations or inconveniences will find it more difficult to do so, when it becomes a duty, than those to whom such sacrifices have been familiar." "It is in vain to think of cultivating principles of generosity and beneficence by mere exhortation and reasoning. Nothing but the *practical habit* of overcoming our own selfishness, and of familiarly encountering privations and discomfort on account of others, will ever enable us to do it when it is required. And, therefore, I am firmly persuaded, that indulgence infallibly produces selfishness and hardness of heart, and that nothing but a pretty severe discipline and control can lay the foundation of a firm and magnanimous character."

I need scarcely allude to the benefit resulting to society, as well as to clients, from thorough professional equipment, enabling the practitioner, while protecting the interests committed to his charge, and adopting the line of duty in all circumstances without apprehension or hesitation, to illustrate the blessings of wise laws and good order.

And, in conclusion, I will only add, that we must never forget that highest of all duties, and indeed of all qualities, viz., the preservation of our own integrity and self-respect—the steadfast adherence to what is right, and rejection of what is wrong, however insidiously suggested, and with whatever motives of self-interest. These are attributes which, while they cannot avert calamity, will sustain us under it, and secure to us what no wealth or preferment can compensate, viz., the ability

"NIL CONSCIRE SIBI, NULLA PALLESCERE CULPA."

FINIS.

APPENDIX.

ADDENDA ET CORRIGENDA.

APPENDIX.
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P. 37, fifth line from bottom of page, for "Entail," read "Disentail."

P. 63, footnote, *in fine*.

A *factor loco tutoris* in submitting his accounts to the Accountant of Court, credited himself with charges for necessary law business executed by a firm of law agents of which he was a partner for behoof of the pupil's estate. A majority of the whole Court, holding judicial factors to be trustees, and, therefore, to be subject to the rule that trustees cannot make profit by agency in the management of the affairs committed to them, found the *factor loco tutoris* not entitled to his business charges, except to the extent of the costs 28 Jurist, 522. out of pocket; *Smith or Reid*, 21st June 1856. A similar judgment was pronounced at the same time in the case of a *curator bonis* to a lunatic. In the case of *Lord Gray, &c. (Castle Huntly Trustees) v. Dundas and Wilson*, *ibid.* decided upon the same day, a body of trustees having, for the preservation of the estate, found it necessary to apply for a private Act of Parliament, employed a firm of law agents in obtaining the Act, and afterwards in carrying it into execution, one of the trustees being a partner of the firm. The trustees now applied to the Court for an order for payment of the business account so incurred, out of the funds which had been borrowed under the powers of the Act, and lodged in bank for the purpose of defraying such expenses. The beneficiaries expressed their willingness that the account should be so paid; but the Court refused the application, excepting as regarded costs out of pocket.

P. 97, footnote.

Since the decision in *Thomson v. M'Crummen's Trustees*, the following 19 & 20 Vict. Act has been passed to abolish certain unnecessary forms in the framing of c. 89. deeds in Scotland, 19 & 20 Vict. c. 89:—"Whereas an Act of the Scottish Parliament was passed in the sixth Session of the first Parliament of his Majesty King William, intituled *Act allowing Securities, &c. to be written Bookways*, which Act statutes and ordains that it shall be lawful to write "any Contract, Decreet, Disposition, Extract, Transumpt, or other security

APPENDIX.

" by way of Book, in Leaves of Paper, provided that every page be marked
 " by the number, first, second, &c., and signed, and that the end of the last
 " page make mention how many pages are therein contained, in which page
 " only witnesses are to sign in writs and securities, where witnesses are
 " required by law: And whereas the safeguards prescribed by the said Act,
 " other than the said provision as to marking every page by number, have
 " been found in practice to be of themselves amply sufficient for the purposes
 " thereof, and the said provision as to marking every page by number has
 " been very generally neglected in practice, and it would therefore be bene-
 " ficial to and for the security of the public that the same should be abolished:
 " Be it therefore enacted by the Queen's most Excellent Majesty, by and
 " with the advice and consent of the Lords Spiritual and Temporal, and
 " Commons, in this present Parliament assembled, and by the authority of
 " the same,

" 1. That from and after the first day of *September* in the year one thousand
 " eight hundred and fifty-six it shall not be competent to institute or to
 " insist in or maintain any challenge of or exception to any deed or writ-
 " ing aforesaid, or any deed or writing of any description whatever, on the
 " ground that the pages thereof are not marked by numbers; and it shall no
 " longer be necessary to mark the pages of any deed or writing by numbers,
 " any law or practice to the contrary notwithstanding: Provided always,
 " that nothing herein contained shall be construed to affect any question
 " which may have been in dependence in any Court prior to the passing of
 " this Act, or any judgment already pronounced, or any decret which has
 " already gone out, or the provisions of the said recited Act, or of any other
 " Act or Acts of Parliament, as to mentioning in the Testing Clause the
 " number of the pages of which the deed consists, or the provision as to
 " signing each page of the deed, or any other provision of the said recited
 " Act."

P. 250, fifth line from bottom of page, instead of " personal right to the
 " lands," read " personal right to obtain a charter of the lands."

P. 421. "The Joint-Stock Companies Act," 19 & 20 Vict. c. 47.

- § 3. This Act does not apply to associations for the purposes of banking or insurance. It enacts, that seven or more persons may by subscribing their names to a memorandum of association, in the form prescribed by the Statute, and by complying with the statutory requisites in regard to registration, form themselves into an incorporated company with or without limited liability.
- § 4. Not more than twenty persons shall, after 3d November 1856, carry on in partnership any trade or business having gain for its object, unless they are registered as a company under the Act, or are authorized to carry on business by private Act of Parliament, or by Royal Charter or Letters Patent; and where any persons carry on business contrary to this provision, each person shall be severally liable for the whole partnership debts, and may be sued for the same without joinder in the action of any of the other partners.
- § 8. Every subscriber of the memorandum of association must take at least one

share in the company, and the number of shares taken by each subscriber must be set opposite his name in the memorandum of association, and upon the incorporation of the company he is entered upon the register of shareholders as a shareholder to the extent of the share so taken. The memorandum of association may be accompanied by articles of association prescribing special regulations for the company; but if no such regulations are prescribed, the regulations of the company shall be deemed to be those contained in schedule B, appended to the Act. The memorandum and articles of association are delivered to the registrar of associations, who retains and registers them. The registrar then certifies that the company is incorporated, and in the case of a limited company, that the company is limited; and the subscribers of the memorandum, as well as other persons who shall become shareholders from time to time, become thereupon a body corporate by the name prescribed in the memorandum of association, having a perpetual succession and a common seal, and with power to hold lands. As soon as the registrar grants a certificate of incorporation, the company may issue their shares, such shares being personal, and not real, estate. In §§ 16 *et seq.*, the Act provides for a register of shareholders being kept. No notice of trust shall be entered on the register or receivable by the company, the person alone whose name is entered in the register being for the purposes of the Act to be deemed a shareholder. Schedule F provides a form of transfer of shares, but the transferrer remains the holder of his share till the transferee is entered in the register book. A certificate of shares under the company's seal is *prima facie* evidence of a shareholder's title thereto. Unpaid calls are to be deemed a debt due by the shareholders to the company.

Part II. of the Statute provides for the management and administration of joint-stock companies. There is to be a registered office; and every registered limited company must have its name affixed to the outside of such office. The name must also be engraved upon the seal, and mentioned on official publications; and also in all bills of exchange, promissory notes, indorsements, checks, and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts, and letters of credit of the company. No company shall be entitled, without the sanction of the Board of Trade, granted by license in the form of Schedule G., to hold more than two acres of land. There is a provision against any registered company carrying on business with fewer than seven shareholders. Any contract which, if made between private persons, would require to be in writing, and signed by the parties, may be made, varied, or discharged on behalf of the company, in writing signed by any person acting under the express or implied authority of the company; and any contract which, if made between private persons, would be valid though made by parole only without being reduced into writing, may be made, varied, or discharged on behalf of the company by any person acting under its express or implied authority, all such contracts being binding upon the company and their successors, &c. A registered company may, by writing under its seal, empower an attorney to execute deeds abroad, and the deed signed by such attorney, and under his seal, is declared binding on the company. A bill or promissory

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note shall be deemed to have been made, accepted, or indorsed on behalf of a registered company, if made, accepted, or indorsed in the company's name by any person acting under the company's express or implied authority. In any bond and disposition in security made according to Scotch Law by any registered company, there shall be implied the following obligations, unless words expressly negating such obligations shall be contained therein, viz. :—An obligation on the part of the company to pay the money thereby secured, with interest; an undertaking that they have power to convey the property declared to be conveyed to the heritable creditors free from encumbrances, and an obligation to make and execute at the expense of the company in favour of the heritable creditor, or any person claiming through him, any further deed necessary to give validity to the security; and if a power of sale is thereby given, it shall imply an authority to sell by public auction, or private contract, altogether or in parcels, and to make, rescind, or vary contracts of sale or re-sale, without being liable for loss; and also an authority to give effectual receipts for purchase monies. The bond and disposition in security may be in the form of Schedule I, and must be registered in the Register of Sasines.

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In any disposition of heritable property granted by a registered company there shall be implied, unless such implication be expressly excluded, an obligation of absolute warrandice, and an obligation to complete the company's title at its own expense, so far as necessary to give effect to such disposition, and an obligation to grant, also at its own expense, any further necessary

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deeds. Any summons, notice, writ, or proceeding, requiring authentication by the company, may be signed by any director, secretary, or other authorized officer, and need not be under seal, and may be in writing or print, or partly in writing and partly in print.

Part III. Provides for the winding-up of joint-stock companies, either voluntarily or judicially.

Part IV. Provides for the constitution and conduct of the registration office of companies; and by

Part V. Former Acts are repealed, and various temporary provisions enacted.

P. 673, footnote.

18 D. 83.

A party having executed a *mortis causa* trust-disposition in favour of certain trustees, thereafter in a codicil recalls the nomination of the original trustees, and nominates certain other parties, but without any dispositive words. Does the dispositive clause in the trust-deed become inept in consequence of the recall of the disponees without a fresh disposition in favour of the new nominees, so that the estate falls to the heir-at-law? This question received discussion in *Mackilligin v. Mackilligin*, 23d November 1855, and the opinions of the Court were in favour of the validity of the trust-deed, and of the competency of the new trustees making up a title directly under that deed. "The requirement of the law having been satisfied by the truster inserting in the original instrument a good dispositive clause, subject to an unqualified power of altering the same, and there being also a good nomi-

" nation of trustees at the time of the completion of the settlement by its
 " *quasi* delivery on the death of the granter, the Lord Ordinary does not
 " think that the validity of the instrument at the latter date would be affected
 " by the circumstance that, during the intermediate period, and while the
 " trust-settlement was only *in cursu* of being completed, one set of parties
 " had been substituted for another as trust disponees. He knows of no autho-
 " rity or principle for holding that the settlement would be nullified by such
 " a proceeding having taken place at a time when no right either in trust or
 " otherwise had been vested in the trustees or donees originally named, and
 " when the dispositive act had not yet been completed by delivery of the
 " instrument. The codicil, being as much a part of the general settlement
 " as if it had been added to the original instrument itself before it was sub-
 " scribed, must be read along with, and as part of it. And, as in the settle-
 " ment, when its parts are thus read together, there was, at the date of its
 " *quasi* delivery by the death of the granter, a good dispositive clause with a
 " good nomination of disponees, the defender's objection appears to be ground-
 " less on principle, and unsupported by authority ;" *per* Lord CURRIEHILL,
 Ordinary. The Lord Justice-Clerk HOPE observed :—" For some years
 " before the death of the late Mr. Jamieson, I had occasion to consider a
 " variety of cases in consultation with him ; and we both held, that, under
 " such a deed as we have here, and similar clauses in later codicils, the trus-
 " tees subsequently nominated had an undoubted right, as much as if the
 " original nomination in the trust-deed had remained unaltered, to complete
 " their title at once by infestment on the trust-deed, and that such infestment
 " was regular, apt, and valid, in point of strict conveyancing ; and that the
 " changes and alterations in the nomination of trustees had no effect on the
 " conveyance in trust, whoever might be named." . . . " The truster
 " by an after-codicil alters the trustees, makes a new set, or adds or substi-
 " tutes, as he thinks proper. Then, what is the effect of this, the trust-deed
 " being declared to remain valid in so far as not altered ? Why, that these
 " parties are made disponees, and their names are substituted for, or added
 " to, the original list. What words he employs are of no moment, for his
 " power under this reservation, *and equally without the reservation*, is absolute
 " over an alterable *mortis causâ* settlement. Whether he says, I nominate
 " so and so to be trustees—or I direct the names of A., B., and C., to stand
 " in the dispositive clause of my trust-deed, as if I had from the first therein
 " inserted them—or, I now give, grant, and dispoise to A., B., and C., instead
 " of to D., E., and F., as the future disponees under my trust-deed—or in
 " whatever form—the result is the same, and either form is equally good.
 " There is in the original deed a conveyance to trustees good and effectual,
 " and without any mid-impediment. He puts into that conveyance, by virtue
 " of his reserved, or inherent, power over his own deed, new trustees or dis-
 " ponnees. The term *trustees* is the same as *disponees* in such a case, for the
 " nomination of trustees under a trust-disposition, by the force of the nomina-
 " tion of them as trustees, makes them trust-disponees. Trustees in such
 " codicils mean trust-disponees ; and as there is a disposition to trust-

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“disponees originally, that remains operative in favour of all who may be
“named, although the whole named in the original deed have been recalled,
“and displaced out of the trust-conveyance as it originally stood. Hence,
“the conveyance is at once one to the new trustees. That the original clause
“of conveyance does not add, ‘or to such other persons as I may name,’ is of
“no moment, for the power of alteration, whether under reservation or at
“common law, imports a power so to alter the mere nomination of disponees,
“the conveyance to trustees remaining effectual to all who are named.”

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